CLERK'S COPY.

Volume 23
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 23

FEDERAL TRADE COMMISSION, PETITIONER
vs.
THE CEMENT INSTITUTE, et al.

No. 24

FEDERAL TRADE COMMISSION, PETITIONER
vs.
AETNA PORTLAND CEMENT COMPANY, et al.

No. 25

FEDERAL TRADE COMMISSION, PETITIONER
vs.
MARQUETTE CEMENT MANUFACTURING COMPANY

No. 26

FEDERAL TRADE COMMISSION, PETITIONER
vs.
CALAVERAS CEMENT COMPANY, et al.

No. 27

FEDERAL TRADE COMMISSION, PETITIONER
vs.
HURON PORTLAND CEMENT COMPANY

No. 28

FEDERAL TRADE COMMISSION, PETITIONER
vs.
SUPERIOR PORTLAND CEMENT, INC.

No. 29

FEDERAL TRADE COMMISSION, PETITIONER
vs.
NORTHWESTERN PORTLAND CEMENT COMPANY

No. 30

FEDERAL TRADE COMMISSION, PETITIONER
vs.
RIVERSIDE CEMENT COMPANY

No. 31

FEDERAL TRADE COMMISSION, PETITIONER
vs.
UNIVERSAL ATLAS CEMENT COMPANY

No. 32

FEDERAL TRADE COMMISSION, PETITIONER
vs.
CALIFORNIA PORTLAND CEMENT COMPANY

No. 33

FEDERAL TRADE COMMISSION, PETITIONER
vs.
MONOLITH PORTLAND CEMENT COMPANY, et al.

No. 34

FEDERAL TRADE COMMISSION, PETITIONER
vs.
ST. LOUIS S. BOND, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1947.

United States of America

BEFORE THE FEDERAL TRADE COMMISSION

Docket No. 3167

In the Matter

of

THE CEMENT INSTITUTE,

an unincorporated association, et al.

EXCEPTIONS TO TRIAL EXAMINER'S REPORT UPON THE EVIDENCE

DONOVAN, EARLE, NEWTON & LUMBARD,
Attorneys for The Cement Institute and other Respondents,
Two Wall Street,
New York.

United States of America

BEFORE THE FEDERAL TRADE COMMISSION

Docket No. 3167

IN THE MATTER

of

THE CEMENT INSTITUTE,

an unincorporated association, et al.

The respondents, The Cement Institute, S. W. Storey, G. H. Reiter, the Vice-President, Treasurer and Trustees of The Cement Institute, Aetna Portland Cement Company, Alpha Portland Cement Company, Arkansas Portland Cement Company, Ash Grove Lime & Portland Cement Company, Beaver Portland Cement Company, Bessemer Limestone & Cement Company, Calaveras Cement Company, Castalia Portland Cement Company, Colorado Portland Cement Company, Consolidated Cement Corporation, Coplay Cement Manufacturing Company, Cumberland Portland Cement Company, Dewey Portland Cement Company, Diamond Portland Cement Company, Edison Cement Corporation, Federal Portland Cement Company, Inc., Florida Portland Cement Company, Georgia Cement & Products Company, Giant Portland Cement Company, Glens Falls Portland Cement Company, Great Lakes Portland Cement Corporation, Green Bay Cement Company of

West Virginia, Green Bag Cement Company of Pennsylvania, Hawkeye Portland Cement Company, Hercules Cement Corporation, Hermitage Portland Cement Company, Idaho Portland Cement Company, Keystone Portland Cement Company, Kosmos Portland Cement Company, Lawrence Portland Cement Company, Lehigh Portland Cement Company, Lone Star Cement Corporation, Medusa Portland Cement Company, Missouri Portland Cement Company, Monarch Cement Company, Monolith Portland Cement Company, Monolith Portland Midwest Company, National Cement Company, Nazareth Cement Company, Nebraska Cement Company, North American Cement Corporation, Northwestern States Portland Cement Company, Oklahoma Portland Cement Company, Oregon Portland Cement Company, Pacific Portland Cement Company, Peerless Cement Corporation, Pennsylvania-Dixie Cement Corporation, Petoskey Portland Cement Company, Pittsburgh Plate Glass Company, Portland Cement Company of Utah, Santa Cruz Portland Cement Company, Signal Mountain Portland Cement Company, Southern States Portland Cement Company, Southwestern Portland Cement Company, Standard Portland Cement Company, Superior Cement Corporation, Three Forks Portland Cement Company, Trinity Portland Cement Company, Union Portland Cement Company, Valley Forge Cement Company, Volunteer Portland Cement Company, Vulcanite Portland Cement Company, Wabash Portland Cement Company, West Penn Cement Company, Whitehall Cement Manufacturing Company, Wolverine Portland Cement Company and Yosemite Portland Cement Corporation, make exceptions to the Trial Examiner's Report upon the evidence as follows:

Note: An index to the pages of the exceptions for the respective paragraphs of the Report appears following page 741.

Paragraph 1*

1. Exception is taken to Paragraph 1 in its entirety because it asserts that all respondents have been members of The Cement Institute at one time or another and implies that the Institute has had a continuous existence as an active trade association since August 1929 and that such existence was founded upon a connected series of "agreements and authorities". The evidence does not support either the assertion or the implication. Further exception is taken to the failure to report the evidence showing the various facts and circumstances which gave rise (a) to the organization of The Cement Institute as a trade association in August 1929 by relatively few respondents, (b) to the objects and activities authorized and sponsored by its membership, (c) to its collapse as an active trade association in early 1930, (d) to its revival and increased membership representative of the entire industry for the first time in 1933, thus qualifying it as a representative organization which could comply with N.I.R.A. and propose thereunder a Code of Fair Competition to federal authorities, (e) to the restriction of functions and the absence of cooperative measures by its members to continue NRA Code activities after the *Schechter* decision and (f) to its limited functions and activities throughout the entire period of its existence. References to such evidence are set forth in Exceptions Nos. 2-11, to Paragraph 1.

2. The Cement Institute was organized in 1929, shortly after, and in direct response to a recommendation by the then Chairman of the Federal Trade Commission, W. E. Humphrey, that the cement industry form a trade association to draft trade practice rules and seek a trade practice conference with the Commission. Resumption of the statistical services of the former Cement Manufacturers' Pro-

*All paragraph designations refer to paragraphs of the Trial Examiner's Report.

tective Association was thought desirable by the manufacturers. The activities of that association had been litigated and approved by the United States Supreme Court. It was contemplated, therefore, that the new association should undertake to provide similar statistical services (Tr. 23877-78; 23889; 24800-01; 27002; 34560-62).

3. The Institute as organized on August 20, 1929 comprised only nine respondent companies all of which did business in the northeastern United States. The Institute was not fully organized until April 1930 after it had undergone two reorganizations to provide for the admission and representation of additional members (Com. Exs. 136 G-J, N-N, 2A-2P; Resp. Exs. 143 A, C-D; Tr. 16709-10). Immediately thereafter a number of resignations caused the Institute to collapse and from mid-1930 until N.I.R.A. the Institute was a dormant body with a few inactive members only. When N.I.R.A. was enacted in June 1933 a rehabilitation of the Institute was effected for the purpose of providing a vehicle to propose a Code under the provisions of N.I.R.A. and for the first time the membership became representative of the entire industry. Thirty-one companies that had never been members joined at this time (Com. Exs. 596 A-C; Resp. Exs. 125 A; 129; 170 A; 1366-67; 1628-29; 1804-06; 2155 A-D; 2172; 2173 B-D; 2169; 2170 A-H; 2175; 2770-71; 2840; 2930 A-C; 2931 A-C; 2988; 2989 A-H; 3404; National Industrial Recovery Act, Title I, Sec. 3a; Tr. 8758-59; 16710-11; 16714-15; 16717-19; 16726; 23928; 27383-85; 27388-89; 30882-83; 30909-11; 30919-24; 36974-76; 41620-21; 42446; Com. Exs. 136 G-J, U, X, 2A-2U, 3E-3G, 3K-3L; 3146 C; 606 H; 607 F-G; 609 B; 611 D; 617 C; 1033 A-B; 3119 B; 3124 D; 3133 G; 3176 M-2B; Resp. Exs. 2155 A-D; 2402; 2637-40; 3403 C; Tr. 2809; 8469-70; 8523-24; 8611; 9133-34; 9168; 10582; 13220-21; 13282; 13374-72; 13581-82; 13844-45; 23877-78; 26974; 27830-31; 28520-25; 29152-56; 30166-67; 30713-14; 31275-77; 32238-24; 32907-12; 34295-96;

34565-67; 34667; 34766-68; 35800; 35922; 36032; 36333; 36489; 37218-19; 37718-21; 37723; 38465; 38649-56; 38659; 38767; 39033-34; 39140; 39254; 39538; 39892; 41961-62; 42317-21; 42877; 42895; 46764-70; 46775-76; 47638; 47657-58; 47670; 47674-75; 48099-100; 48116). Thereafter there were two further reorganizations of the Institute (Com. Exs. 557, p. 327; 600 A-C; 622 E; Tr. 16721-25).

4. The Institute has not operated its several services continuously since 1929 nor has its membership been at all constant since that date. During its life its activities have varied greatly. From early in 1931 until June 1933, the only activity of the Institute was a freight rate service covering a limited area. The activities undertaken when the Institute was rehabilitated under NRA in June 1933 were drastically curtailed in December 1935 (Com. Exs. 136 K-R, U, 2A-2P, 2Y-3G, 3K-3L; 593 A-D; 601; 606 J; 617 A-E; 623 A-C; 624 B-G; 625 B-E; 626 B-G; 634 N-T; Resp. Exs. 125 A-B; 126 A-D; 127 A-D; 143 A-D; 2154 A-B; 2930 A-B; 2933 A-B; Tr. 2797-98; 2806-07; 2825; 11465-66; 14398-99; 16687; 16707-11; 16714-18; 16727-39; 16742-47; 16792; 16815; 16937-38; 17055; 17062-66; 17071-73; 23878; 23889; 23938-39; 26974; 27004-06; 27558-60; 29211; 30735-36; 30867-77; 30881-83; 34566-67; 38659-62; 41621; 42321-22; 46950).

5. The Institute has not functioned under any "agreements and authorities" as listed in sub-headings (a) through (d) of Paragraph 1 and no reference to the evidence is cited in support of the statement. The Code of Ethics was drafted in 1929 in response to Commissioner Humphrey's suggestion that a set of trade practice rules be drafted for presentation to and approval by the Federal Trade Commission at a Trade Practice conference (Resp. Exs. 725; 2928 A-B; 2929; Tr. 23877-78; 23880; 24800-01; 27092; 27298-99; 34560-65). When application for a Trade

Practice conference was postponed from time to time for lack of adequate representation of the industry in the Institute and subsequently abandoned because of a change in policy by the Federal Trade Commission, many member companies resigned and the Institute collapsed (Com. Exs. 36 SS, ZZ, EEE, 3K-3L; Resp. Exs. 125 A; 126 A-D; 725-26 A-B; 2020; Tr. 2807; 13369; 13371-72; 16717; 16729-30; 23889-92; 30867-77; 34565-67; see also citations to Exception 2, Paragraph I, *supra*).

6. Because the Code of Ethics had not been presented to and approved by the Federal Trade Commission the Institute never functioned thereunder; no member of the Institute ever adopted or considered itself bound thereby; nor was it the intention of the Institute or its members that any member be so bound (Tr. 3006-07; 16699; 16913-18; 23889-94; 24280-81; 26336; 27002-03; 34768-71; 35800-01; 37607-08; 39149-50; 42911-13).

7. At the first meeting of the Board of Trustees after rehabilitation of the Institute in June 1933, the Code of Ethics was officially cancelled (Resp. Ex. 2174 C; Com. Ex. 605 C; Tr. 16699; 16927-29; 34770-71).

The following respondents were not members of the Institute at any time prior to such official cancellation of the so-called Code of Ethics: *Aetna* (Resp. Exs. 143 D; 2173 B; Tr. 518-19); *Beaver* (Resp. Exs. 143 D; 2173 B; Tr. 2809); *Calaveras* (Com. Ex. 611 D; Resp. Ex. 143 D; Tr. 2809; 8758-59); *California* (Resp. Exs. 143 D; 2173 B; Tr. 2809; 42446-47); *Colorado* (Resp. Exs. 143 D; 2173 C; Tr. 13844-45); *Coplay* (Resp. Exs. 143 D; 2173 B; Tr. 48099-100); *Federal* (Com. Ex. 617 C; Resp. Ex. 143 D; Tr. 30713-14; *Great Lakes* (Resp. Ex. 143 D; Com. Ex. 606 H); *Green Bag of Pennsylvania* (Resp. Ex. 143 D; Com. Exs. 607 F-G); *Green Bag of West Virginia* (Resp. Exs. 143 D; 2173 B; Tr. [illegible]); *Huron* (Resp. Exs. 143 D; 2173 B; Tr. 33664-65);

Idaho (Resp. Ex. 143 D; Com. Ex. 617 C; Tr. 47628); *Kaiser* (Resp. Exs. 143 D; 1366-68; 1374; 2173 B; Tr. 27383-85; 27388-89); *Kosmos* (Resp. Exs. 143 D; 2173 B; 2770-71; Tr. 36974-76; 37042-43); *Lawrence* (Resp. Exs. 143 D; 2173 B; Tr. 31275-77); *Marquette* (Resp. Exs. 143 D; 2173 C; 2988-89; Tr. 13967; 14065-71; 39033-34); *Monolith* (Resp. Ex. 143 D; Com. Ex. 606 H); *Monolith Midwest* (Resp. Ex. 143 D; Com. Ex. 606 H); *North American* (Resp. Exs. 143 D; 2173 C; Tr. 33907-12); *Northwestern* (Resp. Exs. 143 D; 2173 C; Tr. 2809; 48116); *Oregon* (Resp. Exs. 143 D; 2173 C; Tr. 2809; 8469-70); *Pacific* (Resp. Exs. 143 D; 2173 C; Tr. 2809; 9133-34; 9168); *Pittsburgh Plate Glass* (Resp. Exs. 2173 C; 2840; Tr. 37718-21; 37723); *Portland Cement of Utah* (Resp. Exs. 127 C; 143 D); *Riverside* (Resp. Exs. 143 D; 2173 C; Tr. 2809; 42877); *Santa Cruz* (Resp. Exs. 143 D; 2173 C; Tr. 2809; 86119); *Southwestern at El Paso and at Victorville* (Resp. Exs. 184-06; Tr. 2809; 29152-56; 29163; 39140; 39254; 47670); *Spokane* (Com. Ex. 606 H; Resp. Ex. 143 D; Tr. 2809; 47657-58); *Standard* (Resp. Exs. 143 D; 2173 C); *Superior, Inc.* (Resp. Exs. 143 D; 2173 C; Tr. 2809; 42895); *Three Forks* (Resp. Exs. 143 D; 2173 C); *Trinity* (Resp. Exs. 143 D; 2173 C; Tr. 13369; 13371-72); *Union* (Resp. Exs. 143 D; 2173 C); *Universal Atlas* (Resp. Exs. 143 D; 2173 C; Tr. 34766-68); *Whitehall* (Resp. Exs. 143 D; 1628-29; 2173 C; Tr. 28520-25; 28633; 28703); *Wolverine* (Resp. Exs. 143 D; 2173 C; 2637-40; Tr. 35922); and *Yosemite* (Resp. Exs. 143 D; 2173 C; Tr. 2809; 8758-59).

8. During the effective periods of the NRA Cement Codes, The Cement Institute functioned solely under its Articles of Association and had nothing to do with the administration of those Codes (Resp. Exs. 170 A-B; 174-176 A-B; Tr. 16727; 16941-45; 16958-65; 23931-32; 27550-51; 33914). Further evidence to this effect was rejected

by the Trial Examiner. (Tr. 16944-49; Resp. Exs. 171 A-F; also for id.).

9. After the *Schechter* decision Administration leaders urged adherence to provisions of the invalidated Codes pending revision of the N.I.R.A. to provide for new regulatory measures (Resp. Exs. 31 A-B; 739; Com. Exs. 623 A-C; Tr. 2823-24; 14065-66; 17054-65; 23938-40; 27004; 28703; 29211; 34775; 34979-80; 38659; 41621; 42320-21; 42446-47; 46950). In response to such appeals the Institute, through its president, urged members to carry on the labor and open price filing provisions of the invalidated Amended Code (Com. Exs. 591 A-C; 623 A-C; Resp. Exs. 2466 E; 2932 A-B; Tr. 23938-40). The Trade Practice Committee provided facilities for price filing on a purely voluntary basis. There was no obligation on any company either to file prices or to adhere to any prices filed and the Institute made no attempt to enforce any of the provisions of the invalidated Code (Com. Ex. 991; Resp. Exs. 31 A-B; 127 A-B; 172 A-B; 173 A-B; 740; Tr. 2824-25; 17005; 17065-70; 23944-45; 34774; 35926-27; 39674-75; 41621; 42023; 46950; Resp. Exs. 127 A-B; Tr. 2824; 3130-31; 16066; 17069-70; 23940-41). There was no agreement or understanding between the Institute and its members or between members of the Institute or of the industry to observe the provisions of the Code after its invalidation by the *Schechter* decision (Resp. Exs. 127 A-B; 2466 A-F; Tr. 2823; 38639; 38658-59; 38705; 39165; 39170-71; 41621; 42319-21).

10. Many members of the industry ceased filing prices immediately after the *Schechter* decision on May 27, 1935 (Tr. 4003; 5132-34; 8994-95; 17065-66; 29216; 29543; 31744; 33407-08; 33664-65; 33708-09; 37221-22; 37429-30; 42494). By July 1, 1935 price filing was sporadic and by September of 1935, price filing became meaningless (Com. Exs. 624 D-E; 991; Resp. Exs. 127 A-B; 3121; Tr. 8418; 17005;

17065-70; 23940-41; 27005-06; 27811; 34980-81; 35804-05; 35926-27; 36251; 38704-65; 39674-75; 46949-50).

11. The Compendium was merely a compilation of established terms and marketing methods. The Institute never adopted or functioned under the Compendium. The Institute did not request its members or members of the industry to adopt the Compendium or to adhere to it and never took any action concerning it other than to forward it to its members (Resp. Exs. 127 A; 740; 1617; Com. Exs. 561; 624 E; Tr. 17070-71; 27003; 37415). Members of the industry did not enter into any agreements with respect to the Compendium and were in no way obligated to follow it (Resp. Exs. 740; 1617; 2466 A-F; Com. Exs. 91-92; Tr. 23941-42; 27003-04; 28348-49; 29217-18; 31277-78; 32225; 33188; 33918-19; 34301-02; 34777-95; 35072; 35801-02; 37002-03; 37331; 37390-91; 37415; 37602-03; 39150; 39586-88; 40190; 41817; 42100; 42415-16; 42908-11; 47067-68; 48117-18).

12. Exception is taken to the characterization in Paragraph 1 of the Code of Ethics and the Compendium as "agreements or authorities" because the evidence is overwhelmingly to the contrary (see citations, *supra*, Exceptions Nos. 4, 8, 9).

13. Exception is taken to the citation in Paragraph 1 of Tr. 3132-35 and Com. Exs. 592 A-B since neither of these citations support in any measure the statement that "the Amended Code was voluntarily observed in many particulars by the Institute and the industry."

14. Exception is taken to the citation in Paragraph 1 of Tr. 3008-37 since these pages do not relate to the subject for which they are cited.

15. Exception is taken to the failure to report that the respondent Valley Forge has never been a member of The Cement Institute (see Answer of Valley Forge and exceptions to Paragraph 74, *infra*).

Paragraph 2

1. Exception is taken to the failure to report that subscribers to Cement Institute freight rate books have included manufacturers who were not members of the Institute and state and federal governmental authorities (Com. Exs. 136-3 L; 698 N; 628 B; 797 N; Resp. Exs. 125 A; 127 C; 727-28; 1374-77; 3403 A-C; 3596 A-B; Tr. 4057-58; 12767; 12783; 16873-74; 17126-27; 31080-81; 31272-73; 34567; 35922; 41594). Further evidence to this effect was rejected by the Trial Examiner (Resp. Exs. 2641-42 for id.). See also exceptions to Paragraphs 114-119, *infra*.

Paragraph 3

1. Exception is taken to the failure to report that the purposes stated in the Articles of Association of The Cement Institute were substantially the same as those stated in the constitution of the Cement Manufacturers Protective Association, the activities of which were approved by the United States Supreme Court in *C.M.P.A. v. United States* [268 U.S. 590-91] (Tr. 16690-91).

2. Exception is taken to the implication in the parenthetical note at the end of Paragraph 3 that the "objectives" of the Institute are comparable to the "objectives" of the NRA Codes of Fair Competition for the Cement Industry on the ground that no such implication is supported by the evidence (see Com. Exs. 557; 569; cited).

Paragraph 4

1. Exception is taken to the statement that membership in the Institute diminished "just prior to the adoption of the NRA Code" because it is contrary to the evidence, and to the failure to report that the Institute was a dormant organization for almost 2 years prior to N.I.R.A.; that its membership began to diminish early in 1930; that by

the end of 1931, only 26 respondent companies remained members of the Institute, and its only activity at that time was the maintenance of a freight rate service (Com. Exs. 136-2Y-3G, 3K-3L; Resp. Exs. 125 A; 126 A, B-C; 2155 A-B; Tr. 2807; 11465-66; 13369; 13371-72; 13581-82; 16714-17; 16729-30; 23878; 23889; 26974; 27002; 2825; 30867-77; 34566-67; 38649-56; 41961-62; 42317-18; see also exceptions to Paragraph 1, *supra*).

2. Exception is taken to the failure to report that the National Industrial Recovery Bill was pending in May, 1933 and was passed in June 1933; and that it provided that trade associations, if representative of an entire industry, could present Codes of Fair Competition to the President of the United States for approval (N.I.R.A. Title I, Sec. 3a; see also Resp. Exs. 170 A-B).

3. Exception is taken to the failure to report that rehabilitation of the "dead" Institute presented the only practical means by which the cement industry could promptly and efficiently meet the requirements of this legislation, that it was rehabilitated and that national representation was solicited so that it could qualify as the vehicle for securing approval of a Code of Fair competition under N.I.R.A. (Resp. Exs. 125 A; 170 A; 1366; 1804; 1805; 2169; 2930 A-B; 2988; Tr. 16714-15; 16717-22; 23923; 29163; 30882-83; 34014-15).

4. Exception is taken to the failure to report that when the Institute was revived in June 1933 its Articles of Association were amended to meet N.I.R.A. requirements. Thereafter, 62 members of the industry joined the Institute for the purpose of participating through the Institute in the preparation and presentation of an NRA Code. (Com. Exs. 596 A-C; 606 H; 607 F-G; 609 B; 611 D; 617 C; Resp. Exs. 125 A; 1366; 1367; 1368; 1628-29; 1804-06; 2155 A-D; 2169; 2170 A-H; 2172; 2173 A-D; 2175; 2177;

2178; 2402; 2770; 2771; 2840; 2929 A-C; 2931 A-C; 2988; 2989 A-H; 3404; Tr. 2809; 8469-70; 8523-24; 8611; 8758-59; 9133-34; 9168; 13220-21; 13281-83; 13967; 16710-11; 16714-15; 16718-21; 16726; 16927-31; 23923; 27383-85; 27388-89; 28520-25; 29152-56; 29163; 30713-14; 30882-84; 30887-92; 30909-11; 30919-23; 30928; 31275-77; 33907-12; 34567; 34766-68; 35880; 35922; 36974-76; 37218-19; 37719-22; 38653-57; 38659; 39033-34; 39254; 41620-21; 41961-62; 42318; 42446-47; 42877; 42895; 46765; 46775-76; 47657-58; 47670; 48099-100; 48116). Further evidence to this effect was rejected by the Trial Examiner (Resp. Exs. 171 A-E for id. and 2171 A-B for id.).

5. Exception is taken to any implication in Paragraph 4 that the NRA Cement Code was formulated without opportunity on the part of persons not connected with the cement industry to be heard and to the failure to report that the Cement Code was prepared under the supervision of NRA officials. Numerous drafts were prepared, each containing the suggested revisions of industry members and NRA. Actually, all members of the industry, regardless of Institute membership participated (Tr. 16719; 29184-89; 33665; 33702; 33913-14; 41539-40). After an almost continuous series of conferences with NRA during July and August of 1933 the Code was officially filed with NRA on August 26, 1933. A public hearing was held on September 15, 1933 and all interested parties had an opportunity to state their suggestions and criticisms. Only then was a final draft of the Code formally submitted to NRA (Com. Exs. 606 A-J; 607 A-G; 609 A-H; 610 A-D; 612 A-E; 613 A-C; Resp. Exs. 125 A; 2176 A-B; 2178; Tr. 96; 16976-80). Resp. Exs. for identification 171 A-E, 1815, 1816 and 1821 which were rejected by the Trial Examiner, support the foregoing.

6. Exception is taken to the failure to report that the NRA Administrator, General Johnson, in transmitting the

NRA Cement Code to President Roosevelt for signature on November 3, 1933, stated his findings as follows:

> "(a) The Code as recommended complies in all respects with the pertinent provisions of Title I of the Act, including, without limitation, subsection (a) of Section 7 and subsection (b) of Section 10 thereof; and that
>
> "(b) The applicant group imposes no inequitable restrictions on admission to membership therein and is truly representative of the Cement Industry; and that
>
> "(c) The Code as recommended is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of Title I of the National Industrial Recovery Act."

(Com. Ex. 557). Further evidence to this effect was rejected by the Trial Examiner (Resp. Exs. 171 A-E for id.).

7. Exception is taken to the statement that the trustees of the Institute became the Code Authority for the NRA Code's administration on the ground that it is not supported by any of the citations given and is contrary to the evidence; and to the failure to report the following:

The Code and Amended Code both provided that the Code Authority should consist of seven individuals elected by the Board of Trustees of the Institute which in turn consisted of 12 district trustees, each elected by the members of the industry (Com. Exs. 557; 560).

The National Recovery Administration, in defining the powers and functions of Code Authorities, stated that members of the governing boards of Trade Associations were eligible for selection as industry members of the Code Authority (Resp. Exs. 170 A-B). Some of the Trustees of the Institute during the NRA Code period served as members of the Code Authority but most of the Code Au-

thority members during this period were not Institute Trustees (Com. Exs. 615 A, B; 616 B; Resp. Exs. 1823 B-C; 2177 A-B; Tr. 16941-42; 23931). In addition, the membership of the Code Authority included a representative of NRA who attended its meetings and participated in its discussions (Com. Exs. 631 A; 632 A). The activities of the Code Authority were under the supervision of a deputy NRA administrator who was at all times advised of its activities (Tr. 75; 16992-93). Further evidence to this effect was rejected by the Trial Examiner (Resp. Exs. 171 A-E for id.).

8. Exception is taken to any implication in Paragraph 4 that the Institute and the Code Authority during the Code period did not function as separate entities and to the failure to report the following:

During the entire period of its existence, the Code Authority functioned as an organization apart from The Cement Institute. Neither the Institute nor its Board of Trustees had anything to do with the Administration of the NRA Code by the Code Authority (Resp. Exs. 174; 175; 176 A-B; Tr. 2815; 16727; 16941-42; 16958; 16964; 16966; 16969-70; 23932). The NRA recommended that Code Authorities make the greatest use possible of the available facilities of Trade Associations already existent in the industry for whose Code they might be responsible. Such recommendations included use of the Trade Association personnel, secretary, facilities for collecting dues, and other facilities provided their costs were segregated. The cement industry, the Institute and the Code Authority followed these recommendations (Com. Exs. 559 B; 617 B-C; 623 B; Resp. Exs. 126 D; 170 A-B; 172 A-B; 173 A-B; Tr. 2797-803; 16950-52; 16958; 16971-74; 23932). The Trial Examiner rejected additional evidence which showed that NRA recognized this separation of functions (Resp. Exs. 171 A-E for id.).

Paragraph 5

1. Exception is taken to the statement that G. H. Reiter served in the dual capacity of Chairman of the Code Authority and Secretary of The Cement Institute from December 1934 to the end of the Code period on the ground that it is contrary to the record references cited and is not supported by the evidence (Tr. 2797-99).

2. Exception is taken to the statement that G. H. Reiter was manager of the Chicago Division of The Cement Institute until December 1931 on the ground that it is contrary to the evidence; and to the failure to report that G. H. Reiter served as manager of the Chicago Division from February 1, 1930 to December 31, 1930 when he resigned and from August 1, 1933 until June 1935 and that he became general manager of the Institute in June 1935, and served as such until his resignation on April 15, 1937. In December, 1935, he was appointed secretary of the Institute and he served as such until his resignation on April 15, 1937 (Com. Exs. 623 C; 624 E; 627 B; 628 D; Resp. Exs. 127 A; 143 A-C; 2154 A-B; Tr. 2797-99; 16687).

Paragraph 7

(*Aetna*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Aetna Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Aetna is "identi-

fied" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication that any of the acts and practices of Aetna have been adopted or carried on pursuant to agreement or understanding with any other respondent. Exception is further taken to the failure to report that the President, the former President and the Secretary-Treasurer of Aetna appeared as witnesses and testified fully regarding the development and use of the practices and policies of the company, including the subjects reported in Paragraph 7; and that this testimony showed that Aetna's policies and practices were developed and used independently without understanding or agreement with any respondent (Tr. 29898-30399; 29415-79; 975-1109). F. R. Johnson, the former president, was unavailable for further testimony because he died before respondents' case began. The former general manager and former treasurer also had died before the respondents opened their case (Tr. 30015; 29417; Resp. Ex. 3753; Tr. 47974).

4. Exception is taken to the failure to report that Com. Exs. 20 A-C, 21, 22 B, 23 and 1496 A, cited in Paragraph 7, occurred during the period of N.I.R.A. and the NRA Code and were concerned with matters relating thereto (Tr. 982; 38826; 38782; 25811-12).

5. Exception is taken to the failure to report the following evidence relating to the Aetna Company showing the circumstances leading up to and surrounding the discharge of its sales manager, Cree, in July, 1936:

Aetna is a small company with two mills, one at Bay City, Michigan, with a capacity of 1,100,000 barrels, and one at Fenton, Michigan, of 700,000 barrels (Tr. 29957-58). For some time only the Bay City mill has been operated, as it can supply all the cement Aetna can sell (Tr. 29958).

Aetna markets cement in Michigan, northwestern Ohio, northern Indiana, and eastern Wisconsin (Tr. 30015). In Wisconsin, Aetna markets through a distributor (Tr. 29958; 30022-28).

Ownership of the company has been concentrated in a few persons residing in Boston, Massachusetts. F. R. Johnson, company president until his recent death, and most of the directors, were located there (Tr. 29416-17). They were not familiar with the cement business (Tr. 29416-19). From 1924 to 1929 shipments were large. Aetna made a profit and the Boston owners paid no attention to the business affairs of the company (Com. Ex. 2895; Tr. 990).

During the depression, Aetna's business fell off substantially from operations at over 83% of capacity in 1929 to 35.5% in 1933. Aetna began to lose money and continued to do so up to July 1936 (Com. Ex. 2895; Tr. 1074; 1006). In 1933 the company lost $400,000 (Tr. 983). In 1935 the loss was $107,000 and in 1936, up to April, the loss was $122,000 (Tr. 1074). Aetna lost $700,000 in the five years prior to July 1936 (Tr. 987; 990; 1006; 1034; 1067; 1074; 1092; 29464). Documentary proof of these losses was rejected by the Trial Examiner (Tr. 29423-24; Resp. Exs. 1831 for id.; 1830 for id.).

Beginning in June 1933, with the enactment of N.I.R.A., Johnson began to have more direct contact with Aetna's local management in Detroit, *i. e.*, with Greene and Lingeman, the general manager. He testified, also, that the company's severe losses made him curious about the effectiveness of its local management. The record shows that he attended meetings at which provisions for an NRA Code for the cement industry were discussed. After the NRA Code went into effect, several complaints were filed against Aetna for alleged violations of the Code. Johnson took every opportunity to learn what he could about the cement busi-

ness by visiting his plants and offices in Michigan, attending NRA Code meetings, Institute meetings and meetings of the P.C.A. (Tr. 38826; 982; 38782; Resp. Exs. 2426; 2436 D; 2028; 2029; Com. Ex. 1016).

In 1935 S. N. Bolster, a Boston attorney, who had a large stock interest in and for twelve years had been a director of the company, became secretary and treasurer of Aetna, upon the death of Renee Payne, the treasurer. Bolster then became active and interested in the company's affairs (Tr. 29416; 29417; 29419). Bolster visited the company in Michigan and found that it was going down hill rapidly. He testified that he was so unimpressed by the management and that he had no confidence in it. Although Lingeman was general manager, Cree, according to his own testimony as well as other evidence, took charge of the operations of the company, and increasingly so during the last couple of years of his employment because Lingeman was extremely ill (Tr. 496; 508; 920; 1063-64; 29420; 29434-38).

Johnson had lost confidence in both Lingeman and Cree and when the matter was brought to the attention of Aetna's board of directors, Bolster recommended the employment of a new general manager and voted with the board for the dismissal of both Lingeman and Cree (Tr. 29436-37; 1064-65). Bolster never attended any meeting with competing cement manufacturers. (Tr. 29468-69).

Calvin, who was employed as the new general manager in July 1936, was not recommended to Aetna by competitors and Johnson did not consult competitors about him. Calvin did not advise his previous employer of his new connection until after he had been hired by Aetna (Tr. 1054; 1068; 29900-01). The evidence shows that no respondent (other than Aetna) had anything to do with Calvin's employment by Aetna (Tr. 29901; 29926; 29920; 34404; 36042-43).

The loss of faith in Cree and Lingeman was justified by the condition of the company's affairs when the new general manager took charge. The evidence shows he found the following:

Cree had a poor repufation among dealers, contractors and the purchasing trade generally (Tr. 29920; 29438; 30196). During the Cree-Lingeman regime, normal business records were not kept: There were no sales reports; no records of current shipments; an audit of Aetna's books disclosed that there had been irregularities prior to July 1936 (Tr. 29932-36; 29934-36; 29442-45).

6. Exception is taken to the failure to report that the testimony of Miss Fowley, cited in support of statements in the report, was shown to be unreliable (Tr. 29948; Resp. Exs. 1968 A-M; 1969 M; Tr. 30039-40; 30059-60; 29945; 29952-53; 30047-48; 29953-54).

7. Exception is taken to the failure to report the following evidence:

Since the discharge of Cree and Lingeman, in spite of the fact that the company's prices were reduced three times, Aetna has made a profit each year (Tr. 30197). In 1937, the year after Cree was dismissed, Aetna made $40,000 (Tr. 1074; 1034). In that same year the company opened up about 300 new dealer accounts to whom it sold about 100,000 barrels, and the company has increased its dealer accounts and its total volume of sales each year since that time (Tr. 30012-13).

8. Exception is taken to the failure to report the following evidence regarding the operation of warehouses by Aetna:

For some years Aetna operated warehouses. These were discontinued because they were unprofitable and because the cement could be distributed direct by truck to the job-site, more cheaply than it could be taken by boat

and put in the warehouse. The new procedure was satisfactory to the customers (Tr. 29959-60; 29985-87; 30078-79; Resp. Ex. 1871). The elimination of the Detroit warehouses, which had been the most economical of any of Aetna's warehouses, saved 20 cents per barrel by shipping direct by truck (Tr. 29960). Aetna did not discuss its discontinuance of warehouses with any competitors (Tr. 30079-80) and the evidence shows that Aetna did not close any of its warehouses as the result of agreement with competitors or because of pressure by any competitor (Tr. 30010; 30078-79).

9. Exception is taken to the failure to report the following evidence regarding the prices and price policies of Aetna:

Aetna has found that in order to sell cement it must meet the lowest price in the market (Tr. 30018). It secures its information as to competitors' prices, price changes, and marketing practices from its customers and not from competitors (Tr. 30018-19; 30025-27; 30048-49; 30039; 806; Resp. Exs. 1992; 1993; 1994; 1995; 1996; 1997; 1998; 1999; 2000; 2001; 2002; 2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018; 2019; 2020; 2021; 2022).

Aetna has a base at its Bay City plant (Tr. 30044) and is free to exert price leadership if it desires (Tr. 30049). The company has made several attempts to increase prices, but these increases were not followed by competitors and never became effective (Tr. 30041; 30043-44; 30049-50; 34248; 30068-69; Resp. Ex. 1994; Tr. 30089-90). These attempts to increase prices were not discussed with competitors (Tr. 30061; 30089).

The prices in Michigan have been consistently lower than the prices in surrounding states (Tr. 30056-57; 35906; 35908-12; 6338).

Early in 1937 a competitor initiated a flat price throughout the lower peninsula of Michigan. This decreased all prices. Aetna learned of it through its customers and discovered its extent by the checking of its salesmen (Tr. 30037-40). During 1937 the price of cement was lowered three times and it did not drive any competitors out of the market (Tr. 30046; Resp. Exs. 1996-2022).

Aetna makes sales below its openly quoted prices (Tr. 30173) and it has found that competitors quote prices below Aetna's prices (Tr. 30173).

Aetna considers price to be the delivered price and not the net at the mill (Tr. 30188). The company handles claims for loss or damage in transit (Resp. Exs. 1981-A-B). When Aetna's dealers pay the freight, they pay it to the railroad for Aetna's account (Resp. Ex. 1981 B).

10. Exception is taken to the failure to report the following evidence regarding the bidding practices and policies of Aetna:

Ordinarily government invitations to bid request delivered prices (Resp. Exs. 2027; 2031; Tr. 30112). On such invitations Aetna quotes direct at its current commercial prices. There is no dealer mark-up involved (Tr. 30096; 30098-99).

Aetna does not ordinarily sell f.o.b. mill, because its customers want to know what the cost of cement is going to be at the point of use. Aetna has always been free to bid f.o.b. mill if desired (Tr. 30112).

On a few occasions since 1937 Aetna has been asked by the government to quote f.o.b. mill. Com. Ex. 1339, dated 4/15/38, was the first such request, and Aetna made an f.o.b. mill bid in reply (Tr. 30100; 30101; Resp. Exs. 2023; 2024). The company's dealers, however, complained about this bid (Tr. 30104-08; Resp. Exs. 2025 A-C).

The Sarnia bridge job, to which reference is made in citations to the Report, was a contractor's job and that

is why no bid was submitted by Aetna. Aetna did not discuss this job, nor has it discussed bids on any other proposal, with competitors (Tr. 30122; 30125; 30115; 34246; 38767-68; 36044). The evidence shows that Aetna has had no agreement with competitors regarding its prices on sealed bids (Tr. 30096).

11. Exception is taken to the failure to report the following evidence regarding truck and water delivery:

Aetna allows dealers to come to its mill and get delivery in their trucks, and it has also permitted dealers to take delivery on their trucks at Marinette, Wisconsin (Tr. 30128; 38790). The company also makes deliveries by truck to points throughout Michigan, northwestern Ohio, and eastern Wisconsin (Tr. 30128). About 75% of Aetna's sales move by truck (Tr. 30137).

Aetna's prices for truck loading and truck delivery are terminated by competitive conditions (Tr. 30129). Although there are added costs in loading and packing trucks, Aetna has never had a 15-cent charge for loading trucks (Tr. 30132-33; 30137). Some of Aetna's competitors have a lower minimum truck load limit than it has (Tr. 30136).

The evidence shows that Aetna's trucking policy has not developed or been used pursuant to any agreement with competitors, and the company is free to change its trucking policy at any time (Tr. 30137; 30144).

Aetna does not make delivery by truck into all of its market area because it is uneconomic to do so at long distances (Tr. 30143-44).

Aetna ships some cement by boat (Tr. 30144-45). Such cement is shipped in packages because Aetna has no bulk carrier (Tr. 30144; 30148).

12. Exception is taken to the failure to report the following evidence regarding Aetna's dealer policies and practices and its policies regarding direct sales:

Aetna determines whether it will sell to a dealer or direct to the consumer according to the type of business involved and whether the dealer can perform any service. Each case depends on its own facts (Tr. 30163-64). Aetna, under the present management, has never announced a classification of business (Tr. 30163) and there is no evidence as to what Aetna's policy was before that time (Tr. 30163-64).

Aetna is free to sell cement in any way it pleases (Tr. 30163). Aetna has no fixed definition of a dealer and has never published or announced a definition (Tr. 30148-49). It sells to anyone as a dealer if he appears to be a profitable outlet for cement (Tr. 30148-49; Resp. Exs. 2047; 2048; 2049). The local situation has great bearing on whether Aetna thinks a person would be a good dealer connection (Tr. 30149). The company finds competitors selling to dealers to whom it does not sell, and it sells to dealers to whom competitors do not sell (Tr. 30149).

Aetna still sells to the Indiana Farm Bureau, and at many more points than Aetna did under the superseded management. No competitors sell to this agency at as many points as Aetna does (Tr. 30155; 30156-57). Competitors have never asked Aetna to discontinue selling to the Indiana Farm Bureau, and Calvin has never discussed the Indiana Farm Bureau with competitors (Tr. 30156). The evidence also shows that competitors of Aetna have always sold to the Indiana Farm Bureau (Tr. 30381-82; Resp. Exs. 3117 A-B).

Aetna sells and has been free and willing to sell to any farm bureau or farm cooperative (Tr. 30157-58; 30161-62; see also Resp. Exs. 2051-58 for id.). The evidence shows that Aetna has not refused to sell cement to any dealers as the result of agreement with competitors (Tr. 30162).

13. Exception is taken to the failure to report the following evidence regarding Aetna's membership in The Cement Institute:

Aetna was not a member of the Institute in July 1936. It subsequently joined the Institute in order to receive the Institute freight rate services (Tr. 30164-68; Resp. Ex. 2059).

The Institute has not attempted to dictate to Aetna the manner in which it should sell cement (Tr. 30170). There was no discussion of prices or pricing policies and no agreement regarding prices or sales methods at Institute meetings attended by representatives of the Aetna Company (Tr. 30171).

Aetna uses both the Institute rate books and the official railroad tariff, and in any instance of discovered error, uses the correct rate (Tr. 30351-52; 30356).

Although Calvin was appointed to a Code Authority Committee to draft a revision of Article XI, the Committee never met or acted (Tr. 30169-70).

14. Exception is taken to the failure to report that Aetna does not come into competition with imported cement, and that Aetna has not had any agreement relating to imported cement (Tr. 30173).

Paragraph 8

(*Alpha*)

1. Exception is taken generally to the failure to report on, or to summarize fairly the evidence offered by Alpha. The Report refers only to 178 of the total 3433 pages of testimony by the four responsible executives who testified on behalf of Alpha, as follows: Magee, Tr. 22506-23001; Coogan, Tr. 23010-25035; Postelle, Tr. 25036-482; Fellows, Tr. 25484-951. The Report refers only to 20% of the 653 exhibits introduced through these witnesses.

2. Exception is taken to any implication in Paragraph 8, Paragraph 82 or the footnote to page 9 of the Report that Alpha is "identified" or connected by the evidence with "group activities" or industry policies or practices; or any alleged activities, policies or practices of The Cement Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below; also exceptions to Paragraphs 1-6, *supra*).

3. Exception is taken to the statement that Alpha is a New Jersey corporation organized in 1910, and to the failure to report the following evidence regarding the company generally:

Alpha was organized in 1895 and was reorganized in 1910 (Tr. 23012). It markets cement throughout eastern and southern United States and for the most part east of the Mississippi River (Tr. 23040-42). Alpha has acquired mills in various parts of the country solely as a result of normal competitive aggressiveness in serving and holding attractive markets with due regard to the location of raw materials (Tr. 23012-13; 23016-40).

4. Exception is taken to the statement: "See also: as to pricing (Tr. 24808-23; 25406, *et seq.*)", because it is a misleading and wholly inadequate reference to the pricing policy of Alpha. It omits all reference to the more than 900 pages of testimony and to more than 300 exhibits which explain the Alpha pricing policy. Exception is further taken to the failure to report the following evidence regarding the pricing policies of Alpha:

The Alpha Company today sells cement almost entirely at destination prices. To sell cement it must at least meet the lowest price found at any destination where it desires to sell (Tr. 23042; 23052).

At each of Alpha's mills, with two exceptions, the executives of the company have established a figure from time to time which is used as a base. Alpha arrives at its destination prices by adding to this base the railroad freight from the mill to each destination, unless it finds that lower prices are being quoted by competitors. In that event Alpha meets the lower prices (Tr. 23052). Theoretically, the base figure which is established is one which will yield a normal profit, but in practice, for many years, these base figures have been limited by various competitive conditions which Alpha must meet (Tr. 23988). The witness Coogan described in detail how Alpha determined the basing status of each of its mills (Tr. 23111-45).

In the area adjacent to each of Alpha's mills usually there are numerous different switching charges to various points in the neighborhood. Alpha's customers are in direct competition with each other within this area. If the different switching charges were added to Alpha's mill base, differing destination prices would result. To place these competing customers on an equal basis Alpha has long followed a practice of computing each of the destination prices within the area adjacent to a base mill by adding the same line haul rate to the mill base, with the result that all competing customers are quoted the same price (Tr. 23054; 23140; 23175; Resp. Ex. 456).

There are a great many places where Alpha quotes prices which are lower than any combination of mill bases plus freight rates. For example, in Brooklyn, New York, the freight rate to dealers located along the waterfront is considerably less than the rates to dealers located in the interior of Brooklyn. Both groups of dealers, however, are in competition with each other and it is necessary to quote all of them the same price. Alpha has met the prices of competitors, who have quoted all competing Brooklyn dealers upon the basis of lower rates to the waterfront (Tr. 23061-62; 23990).

Some years ago another company instituted very drastic reductions in the prices of cement in areas along the Atlantic coast in which large quantities of foreign cement were being sold. Alpha met these prices which were lower than any combination of base plus freight. (Tr. 23830; 23050). There are also numerous local competitive situations in which Alpha finds prices being quoted which are lower than any combination of base plus freight and Alpha reduces its prices to meet such competition. (Tr. 23051; 23052; 23061).

The Company has a large number of salesmen and about three thousand customers almost all of whom are quoted by one or several of Alpha's competitors. It receives from them constant and immediate reports of destination prices being quoted by its competitors. When Alpha finds that a number of destination prices quoted by competitors seems to reflect a pattern of a basing point price plus freight, it considers such points base mills and uses them in quoting its destination prices. It never has any assurance that any competitor will continue to use such bases or quote these destination prices. It bases its action solely on its field reports of what has happened. Sometimes it finds it has estimated incorrectly and that its prices are not as low as the lowest prices in given markets. In such cases Alpha reduces its prices to meet the lowest known prices and often reinvoices customers on sales already made (Tr. 23058-60; 23168-70; 23177-80; 23345; 23206-10; 23215-24; 23228-33; Resp. Exs. 511-19). The way in which Alpha learns of its competitors' prices was fully explained (Tr. 23180-204; Resp. Exs. 458-510; see also exceptions to Paragraphs 88-92, *infra*). When Alpha has had occasion to quote at points where market prices have not been known previously to its sales staff it has determined its prices on the same basis that other prices in the adjacent territory seem to be determined (Tr. 23204-06).

5. Exception is taken to the failure to report that the application of Alpha's policy to many of the bids in Commission's exhibits and the independent determination of the company's prices on them was explained in detail by executives of the company on the witness stand (Tr. 25036-481; 25493-951; Resp. Exs. 817-24; 826-1028; 1036-46; 1049; 1053; 1054; 1057; 1059-82); and to the further failure to report that responsible executives of Alpha testified that officers of the company have never had any discussions, agreement or understanding with any of its competitors concerning the prices Alpha would quote or the method they would use in quoting prices, and that they have never had any discussion, agreement or understanding as to what mills Alpha would use as base points (Tr. 23126-29; 23153; 23155; 25511; 25570; 25682-83; 25728; 25780; 25805-06; 25046; 25048-49; 25131; 25175-76; 25201; 25248-49; 25263; 25271-72; 25310; 25378; 25400).

6. Exception is taken to the failure to report the following evidence regarding the origin of the use of basing points by Alpha:

Alpha commenced business in 1897 and at first marketed its product f.o.b. mill through a general sales agent who sold to distributors. In 1901 it discontinued the general sales agent and sold directly to wholesale distributors located in different parts of the country. The distributors in turn sold to dealers and consumers at 'delivered' prices. In 1902 the company began to discontinue its distributors and to sell direct to dealers and consumers, and within a few years all sales to distributors were terminated (Tr. 23044-46).

When the company began to sell direct to dealers and consumers it found that in most cases consumers wished to know the cost of the cement delivered and that they were not generally familiar with freight rates. For awhile thereafter some sales were quoted f.o.b. mill, some f.o.b. mill with the freight in cents per barrel shown on the quotation, and some at f.o.b. destination prices (Tr. 23046-48; Resp. Exs. 432-49).

By 1912 as the result of gradual evolution Alpha had adopted the practice of selling f.o.b. destination. Three

factors contributed to the development of f.o.b. destination sales by Alpha. These were (a) the company's change in marketing practices by discontinuing first the general sales agent and then the distributors and selling direct to the dealer and customer trade, (b) the demand of these customers to know what the cement would cost laid down at their designations, and (c) (as explained more fully below) the building of new mills and new competition in other sections of the country (Tr. 23096). Since 1912 the company's commercial sales with minor exceptions have been at delivered prices (Tr. 23106).

Until after 1905 there was not much cement produced outside of the Lehigh Valley (Tr. 23098). Therefore when Alpha began to quote delivered prices it merely added the freight from the Lehigh Valley rate to its mill base there, and for some years that was the only base it used (Tr. 23097; 23098). When new companies built mills west of the Lehigh Valley they at first merely adopted the prices quoted from the Lehigh Valley which reflected the Lehigh Valley base (Tr. 23101). When Alpha acquired its Manheim, West Virginia mill in 1909 it found this to be the case and it, too, quoted on that basis (Tr. 23099).

Further new mills and increasing competition in the west caused the various western mills successively to quote delivered prices lower than those reflecting the Lehigh Valley base by using their own mills as bases and adding freight therefrom. Despite such lower prices for western cement Alpha was able for a time to continue to sell its cement in the west at delivered prices based on its Lehigh Valley mill because there was a prejudice against western cement in favor of that made in the Lehigh Valley. By 1912 however this prejudice had disappeared and Alpha was forced to reduce its delivered prices in the western territory to meet the prices of local mills. Alpha found western prices reflecting bases at Stroh, Indiana and Mitchell, Indiana and in 1913 began to use these bases. In 1913 it added Universal, Pa. as a basing point. In 1914 it also used as bases Richard City and Kingsport, Tenn., Bellevue, Mich. and its own mill at Alsen on the Hudson River, New York. In 1916 it used fourteen additional basing points. And in most years additional basing points have been used so

eighty-four basing points in computing its delivered prices (Resp. Ex. 455; Tr. 23101-11).

The testimony of the executive of Alpha who witnessed this historical development showed that it came about without understanding or agreement and was a natural and competitive evolutionary process (Tr. 23043-48; 23096-111; 24887).

7. Exception is taken to any inference of collusion or agreement in the bare statement "Alpha submitted bids which were identical with those of several of its competitors on January 18 and September 6, 1935 (Com. Exs. 178 A; 372 A); June 5 and September 8, 1936 (Com. Exs. 373 A; 303 D); and on August 30, 1937 (Com. Ex. 108 A)". Exception is further taken to the failure to report any of the testimony and exhibits introduced by Alpha explaining its procedure on these lettings which shows the following:

Three witnesses described the procedure used by Alpha in submitting bids to federal and state agencies (Coogan, Tr. 24039-40; Postelle, Tr. 25167-69; Fellows, Tr. 25100-09). Alpha files relating to many of these bids were introduced in evidence and each of these witnesses described in detail the steps by which prices quoted in respect to bids prepared under his direct supervision were arrived at without agreement or contact with competitors (Tr. 24040-268; 25037-393; 25494-789; 257800-10; Resp. Exs. 751-824; 826-1028; 1036-46; 1049; 1053; 1054; 1057; 1059-82).

8. Exception is further taken to the failure to report the following evidence regarding Com. Ex. 178 A cited in the report:

Com. Ex. 178 A refers to bids submitted to the War Department on January 18, 1935 for delivery of 1,200,000 barrels of cement for the Tygart Valley River Project near Grafton, West Virginia. The undisputed facts shown by the evidence regarding this letting are as follows: At this time, the NRA Cement Code was in effect and the invitation required bidders to conform to their NRA Code. Under the Code all companies were obliged to file their prices at least five days in advance of their use. Alpha, without any communication with any of its competitors, individu-

ally decided to bid on the basis that the TVA had previously established on its lettings, that is, a delivered price representing $1.30 plus freight from the second nearest mill. In this case, the second nearest mill was the Universal Atlas mill at Pittsburgh. This method resulted in a price of $1.84 at Grafton which was about 20 cents below Alpha's current commercial price at this point. Alpha filed its price with the Code Authority and submitted its bid at this price. In accordance with the usual procedure, the Code Authority advised interested companies of the Alpha filing and Alpha's reduced price was met by the other bidders (Tr. 25257-60; Resp. Exs. 810; 811).

All bids were rejected and the Government readvertised. On the second letting Alpha without communication with any competitor, reduced its former bid price to $1.77, filed this lower price with the Code Authority and bid it to the Government. Again all bids were rejected and new bids asked. Again, Alpha without communication with any competitor, but after consultation with government officials, decided to still further reduce its price to $1.70 which price it filed with the Code Authority and bid. On this last bid it received an award of 300,000 barrels. The other companies interested in bidding on these three invitations had notice of Alpha's successively lower prices through the NRA open price filing and therefore either refrained from bidding or else met the lower Alpha prices (Tr. 24261-67; 24388-91; Resp. Exs. 812-16).

9. Exception is taken to the failure to report the following evidence regarding Com. Exs. 372 A, and 303 D; cited in Paragraph 8:

These invitations called for bids on 264; 500 and 332 barrels of cement respectively. The prices quoted by Alpha were determined in a routine way by Alpha's sales office employees. The prices quoted were the current prices Alpha was quoting its commercial buyers at the respective destinations. The undisputed evidence shows that Alpha had no communication with any competitor regarding these bids (Tr. 24145-47; Resp. Ex. 783; Tr. 24039-40; 24042-43).

10. Exception is taken to the failure to report the following evidence regarding Com. Ex. 180 A; cited in Paragraph 8:

Com. Ex. 180 A is a tabulation of bids submitted to United States Army Engineers at Vicksburg, Miss., on August 30, 1937, for 1,200 barrels of cement to be delivered at Monroe, La. The invitation called for prices for cement delivered at Monroe or in the alternative f.o.b. the bidder's mill, to enable the government to take advantage of land grant rates if any were applicable. This exhibit shows that Alpha bid a delivered price of $3060, or $2.55 a barrel and a destination cost, if the government took title at the mill, of $2,772, or $2.31 a barrel. From the destination cost bid the government could deduct its actual freight from the Alpha mill to destination to determine the f.o.b. mill price.

Alpha introduced evidence which showed that the price of $2.55 a barrel was its current commercial price at that destination (Resp. Ex. 859).

The destination cost price was determined as follows: The government had on a number of occasions previously asked bids for cement to be used at Monroe, and had issued tabulations of these bids showing mill prices and land grant rates from the various competing mills. On a prior bid to the United States Government, one of Alpha's competitors had dropped all fractions of a cent from its bid price involving land grant rates. Alpha had likewise done so on intervening bids since a failure to do so meant that it would necessarily be high on any bid it might make.

Although the government had previously furnished applicable land grant rates, these sometimes changed. Before making its bid therefore, Alpha obtained from the Louisville and Nashville, the Southern and the Illinois Central Railroads the current applicable land grant rates from those mills which were shown by prior lettings at Monroe to have the lowest government freight cost. From commercial quotations picked up in the field Alpha knew the mill bases currently reflected in commercial prices quoted by these mills. The land grant rate of 11.034 cents per hundred from Boyles to Monroe—equal to 41.9292 cents a

barrel—was the lowest available rate. It added this to the Boyles mill base of $1.90 in paper sacks which produced a destination cost of $2.31992 a barrel. Alpha dropped the major fraction of a cent and bid a destination cost of $2.31. The exhibits and the testimony explain the information and its sources upon which the Alpha Company acted. The Alpha witness who supervised preparation of this bid and the other aforementioned bids, testified that the Alpha Company had no communication of any kind with any of its competitors as to this bid or any of the previous bids (Tr. 25201-05; 25211-12; 25218-29; 25291-92; 25298-311; 25327-30; 23331-37; Resp. Exs. 856-59; 886-92; 897).

11. Exception is taken to the failure to report the following further evidence regarding bids submitted by Alpha:

During the period from 1927 through 1933, Alpha submitted numerous f.o.b. mill bids to federal agencies (Resp. Exs. 2350 P; 847; 854; 856; 863; 871; 881; 769 H; 829; 1064; 1078 B; Com. Exs. 767; 779; 780; 781; 783; 784; 788; 1099 C; 3103).

During this period federal agencies also asked for bids f.o.b. destination and requested bidders to state the amount of freight to be deducted to arrive at an f.o.b. mill price. Alpha submitted bids on such proposals (Com. Exs. 766; 778; 787; Resp. Exs. 833 B; 1059).

During the Code period all proposals on which Alpha submitted bids required compliance with the NRA Code (Resp. Exs. 2914 T; 888 D; 753 A; 2993 F; 2282 A; 2918 U. V. W; 1713 A; 812; 816; 1082 D; Com. Ex. 382). As early as Sept. 20, 1933 federal agencies were requesting compliance of bidders with their NRA codes (Resp. Ex. 1073 G).

During and since the NRA Code, to destinations where land grant rates were available to the government, Alpha quoted either f.o.b. mill prices or prices whereby the government could obtain its f.o.b. mill price through use of the "control clause" (Resp. Exs. 888; 753; 1082 P; 974; 960-61; 957; 939; 950; 947-48; 920; 898; 908-09; 777; 894; 802; 801; 803; 804; 775; 3168 C).

12. Exception is taken to the failure to report regarding land grant rates and the so-called "control clause" as follows:

Alpha determines land grant rates used in preparation of bids to the United States Government from information obtained from railroad traffic departments and from various governmental agencies, Tr. 24195-97; see explanations of bids submitted by Alpha involving land grant rates: (Tr. 24040-51; 25037-347; 25729-65; 25764-811; 25432-33).

Alpha began to attach the so-called "control clause" to bids involving land grant rates after such a clause had been duly filed under NRA procedure by a competitor. The vice president in charge of sales of the company testified that it began to use this clause without any understanding or arrangement with any competitor, and so long as it continued to use the clause, it did so solely as a matter of individual company policy (Tr. 24200-02).

13. Exception is taken to the statement "as to trucking Com. Exs. 976-9 B"; because this statement and the reference thereto is a wholly inadequate and misleading description of Alpha's practices and policies with respect to deliveries to trucks. The aforementioned reference relates only to a partial showing of Alpha's practices at one of its mills which were in no way representatives of its practices at other Alpha mills. Exception is taken to the complete omission in the report of any reference to nearly 100 pages of testimony in which Alpha's various trucking practices and the reasons therefor were fully described (Tr. 23644-742), and to the failure to report the following evidence:

Alpha has always been opposed to the delivery of cement to trucks (Tr. 23654). The company's policy has been due to the combination of a number of reasons. The loading of trucks is irregular as compared with the loading of cars; increased costs and labor dissatisfaction result from consequent interruption of packing and loading schedules (Tr. 23654-55; 23674). Equally important have been the dissatisfaction of most of Alpha's dealer customers with this medium of transportation, which enabled

a few dealers to obtain special advantages not available to most others (Tr. 23660; 23662).

Delivery of cement by trucks in the territory served by the Alpha Company mills did not become important until 1929 (Tr. 23644; 23666). During the years 1929 to 1932 Alpha found certain cement companies in various parts of the country were delivering cement to customers' trucks. Where its customers requested the privilege, Alpha reluctantly opened some of its mills to trucking in order to meet this competition (Tr. 23644; 23650-52; 23654; 23664). When it found that in some districts other manufacturers were charging an extra 15 cents for truck loading it gladly availed itself of the opportunity to make a similar charge (Tr. 23689-90; Resp. Ex. 704; Tr. 23693; 23674). When it found that in any territory its competitors had discontinued deliveries to trucks it also gladly discontinued truck deliveries from its mill in that territory (Tr. 23664; 23693-95; Resp. Ex. 706; Tr. 23716).

The witness Coogan testified that Alpha has never had any agreement or understanding with its competitors or with its dealer or railroad customers as to trucking; nor as to when or where Alpha would permit it; nor as to any extra charge for truck delivery; nor as to Alpha's discontinuance of trucking at any mill (Tr. 23653; 23716; 23733; 23742).

The company maintains warehouses at Green Bay and Milwaukee, Wis., Washington, D. C., Miami, Fla., Cleveland, Ohio, and Bellevue, Mich. At all times during which it has maintained these warehouses, it has always loaded customers' trucks from these warehouses and has never discontinued such deliveries (Tr. 23651; 23727-28).

From its mill at Alpha, Mo., just outside of St. Louis, in the four years 1929 to 1932, Alpha's deliveries by truck were less than 2/10ths of 1 per cent of its total shipments from that mill and it has had practically no requests from customers for delivery to trucks (Resp. Ex. 703; Tr. 23650-51).

From its mill at Ironton, Ohio, in the four years 1929 to 1932 its deliveries by truck were less than 1 per cent of its total shipments from that mill. Instructions were

given on December 12, 1931, to make no more truck deliveries from that mill, but some shipments were made in 1932 in performance of contracts entered into prior to December, 1931 (Tr. 23714; Resp. Exs. 703 and 711; Tr. 23665).

From its mill at Manheim, W. Va., in the four years 1929 to 1932 its deliveries by truck were less than 4 per cent of its total shipments from that mill. It discontinued making deliveries by truck at Manheim, W. Va., on June 10, 1932 (Tr. 23702-03; Resp. Exs. 703 and 707; Tr. 23665).

From its mill at Alsen, N. Y., in the four years 1929 to 1932 its deliveries by truck were about 8 per cent of its total shipments from that mill. Most of these truck deliveries were to a large construction contract near the mill. It discontinued deliveries to trucks in August 1932 (Tr. 23650; 23665; Resp. Ex. 703).

From its mill at Martins Creek, Pa., in the four years 1929 to 1932 its deliveries to trucks were less than 2 per cent of its total shipments from that mill. It discontinued deliveries to trucks at that mill in August 1932 (Tr. 23665; Resp. Ex. 703).

From its small mill at Jamesville, N. Y., in the four years 1929 to 1932 its deliveries to trucks were about 75 per cent of its total shipments from that mill. Most of these truck sales were to a few customers in Syracuse who requested Alpha to continue selling to them by truck but to refuse to sell that way to other customers. Alpha discontinued truck deliveries at this mill in August 1932 because operating costs were seriously increased and customer relations strained and adversely affected. In 1937, however, Alpha was forced, by the competition of another cement manufacturer which began making deliveries by truck, to resume such deliveries from its Jamesville mill. Alpha has lessened operating irregularities by making the deliveries in trucks which it hires and whose loading schedules it can thus control (Tr. 23665; 23666; 23668-69; 24659-60; 23652; 23683-88; Resp. Ex. 703).

From its mills at LaSalle, Illinois and Phoenixville, Alabama, the Alpha Company has never made any deliveries to trucks and it has had no request for such delivery from any customers (Tr. 23650-51; Resp. Ex. 703).

Since Alpha has discontinued deliveries to customers' trucks at its various plants, it has had practically no requests from customers for deliveries to trucks (Tr. 23645).

14. Exception is taken to the phrase "as to other uniform dealer policies, Com. Exs. 731-4 F" because it assumes an existing "uniformity" without supporting the assumption by reference to any evidence and there is no evidence to show that any "other" Alpha "dealer policies" are "uniform" with those of other respondents; and the statement and the reference accompanying it are a completely inadequate summary of the evidence of Alpha dealer policies. In particular, the reference consists merely of a marketing policy issued by Alpha in 1935. Exception is taken to the complete omission of any reference to some eighty pages of testimony and a large number of exhibits in which the origin, development, and reasons for Alpha's dealer policies including the one in question are set forth in detail (Tr. 23306-08; 23314-20; Resp. Exs. 523-24; 527; Tr. 23341-42; 23468-64; 23557-639; Resp. Exs. 671-94), and to the failure to report the following evidence:

Since distributors were eliminated in 1903 Alpha has classified its customers engaged in the business of re-selling cement as dealers. Some sort of yardstick was necessary to distinguish "dealers" from other types of customers, and Alpha has had a definition of a dealer for the guidance of its sales force since 1903. This definition appeared in written instructions to the Alpha sales force in 1916 (Resp. Ex. 673 C; Tr. 23570; 23621). Alpha has followed a strictly individual policy of interpreting which customers fall within its definition of a dealer and which do not. It has not been influenced by the recognition of dealers accorded or not accorded by competitors and sells to dealers not so recognized by competitors (Tr. 23621; 23625-28).

The bulk of Alpha's shipments has always been distributed through dealers. This was so even prior to 1915, when about ninety per cent of Alpha's business was being sold to dealers (Tr. 23558). At first, there was no great demand for direct sales, but in the late 1900's, with an in-

creasing demand for such sales, Alpha was subjected to conflicting pressure by its two classes of customers: those who purchased for re-sale and those who purchased for their own use as consumers. From time to time Alpha made spasmodic attempts to grant special recognition to dealers because they were the most important single class of Alpha customers. Finally, about 1915, Alpha established a differential whereby dealers were quoted five cents lower than other customers. Competitors followed Alpha in adopting this policy (Tr. 23449-60).

From 1915 until 1931, dealers were given special consideration by Alpha through the aforementioned differential and subsequent increased differentials or dealer discounts (Tr. 23560-64; Resp. Exs. 671-72; see also Exception No. 14 regarding discounts and terms of sale, and citations thereto, *infra*). In addition, Alpha has always maintained a policy of confining its sales to dealers, except for certain classes of customers and for certain specified work (Tr. 23566).

The reason for Alpha's preference for dealer business is that dealers provide a steady outlet for the marketing of cement in quantities so small that a manufacturer cannot perform the sales services which are required (Tr. 23605-07).

In 1916, the Alpha Company sent to its sales force an instruction as to dealer sales policy which was the first attempt to formulate definite rules for the company's direct and dealer sales (Resp. Ex. 673). From time to time thereafter, this policy was modified and made more definite, partly in response to customers' demands and partly to meet competition by other cement manufacturers. Since this original policy, there has been a variable trend toward a larger proportion of sales direct to consumers. This was due to the development of new kinds of construction work on which dealers were not in a position to perform their normal service (Tr. 23567-68; 23584-85). From 1916 through 1933 Alpha has issued a series of sales instructions and announcements which describe the gradual evolution of its dealer policies (Resp. Ex. 671-78; Tr. 23561-93).

A classification of dealer business was specifically provided in Art. XI of the first NRA Code, which was substantially the classification the Alpha Company had been using prior to 1933. When this article was suspended the Alpha Company made no change in its practice. Finally, in response to insistent dealer demands that it make a formal public statement of its dealer policy it issued a circular formally stating its policy (Com. Exs. 731-4 F). Many of its dealer customers were dissatisfied with the provisions of this policy and in response to their protests in April, 1935 it issued a modified statement of policy (Resp. Ex. 685) which policy it has since followed (Tr. 23593-617; Resp. Exs. 685-702; see also Resp. Exs. 679-84; Tr. 631-44).

The witness Coogan, testified that none of the various Alpha dealer policies were arrived at or observed pursuant to any agreement, understanding or colusion with competitors and to the extent that at any time these policies have been identical with those of Alpha's competitors, such uniformity has been forced by competition and was not the result of collusion (Tr. 23639).

15. Exception is taken to the failure to report the evidence regarding Alpha's discounts and terms of sale, as follows:

Discounts and terms of sale are integral parts of Alpha's prices. It is just as necessary for Alpha to meet discounts and terms of sale more favorable to customers as it is for Alpha to meet lower prices offered by competitors (Tr. 23466). Discounts and terms of sale offered by Alpha have been changed from time to time in a definite trend of increasing liberality to buyers. Some of the changes in discounts and terms have been initiated by Alpha; the remaining changes Alpha has been forced to follow in order to meet competition (Resp. Exs. 432-54; Tr. 23064-66; 23083-85; Resp. Exs. 543-672; Tr. 23381-564; 23995).

The witness, Coogan, testified that discounts and terms of sale offered by the Alpha Company have never been adopted or used pursuant to any understanding or agreement with competitors (Tr. 23467-68).

16. Exception is taken to the failure to report the following evidence regarding Alpha's policy with respect to diversions:

Since about 1910; the Alpha Company has always endeavored to prevent diversions of cement by various practices and policies which it has adopted (Tr. 23300-36; Resp. Exs. 523-29). When Alpha cement has been diverted contrary to Alpha's policy, congenial dealer relations are impaired because dealer customers complain that their home markets have been invaded by outside dealers (Tr. 23302-03).

The witness Coogan testified that Alpha has never had an agreement or understanding with competitors relating to the adoption or use of the various methods undertaken by Alpha to prevent diversions (Tr. 23322-26; 23328; 23332; 23335).

17. Exception is taken to the failure to report the following evidence regarding Alpha's use of water transportation:

Alpha has used barges for the transportation of cement from several of its mills whenever their use was economically feasible and whenever their customers have desired such delivery (Tr. 23119-22; 23743-46; 23810-13; 24543-46). Alpha's experience with water transportation, however, has revealed that usually the costs are about the same as those for rail transportation (Tr. 23810-15; 23759-60; 23801; 24554-55; 24780-81; 24563-64).

18. Exception is taken to the failure to report the evidence regarding Alpha's competition with imported cement as follows:

About 25 per cent of Alpha's total annual shipments are made into areas along the Atlantic seaboard and Gulf coast where competition from foreign cement exists (Tr. 23816-17).

Alpha has initiated, as well as met various price reductions made by competitors in order to meet imported

cement competition (Tr. 23830-33; 23840-50; Resp. Exs. 720; 721-22). Despite low prices it has been Alpha's policy to remain in the markets in which imported cement is sold because from past experience it has learned that once a market is abandoned, the seller must begin all over again in order to get back into that market and often can never regain his original dealer outlets (Tr. 23834). In December 1936 Alpha initiated depressed prices in southern seaport markets in which foreign competition was most severe (Tr. 23847; 23850-51). The witness Coogan testified that there was no agreement or understanding between his company and any other company regarding depressed prices to combat foreign cement (Tr. 23843-44). He also testified there was no connection between or agreement concerning the initiation of lower prices at southern ports by Alpha and the establishment of lower prices by other companies along the Atlantic seaboard (Tr. 23848-52). Alpha discontinued depressed prices at the southern ports in the latter part of 1938 and its move was followed by competitors (Tr. 23852-55). It also followed competitors when some of them discontinued using depressed prices in New York and Boston in 1938 (Tr. 23855-58). Witness Coogan testified there was no discussion with competitors regarding removal of the so-called depressed or arbitrary prices (Tr. 23858).

Witness Coogan testified that Alpha followed competitors without any agreement or consultation in adopting a policy of refusing to sell Alpha cement to dealers handling foreign cement (Tr. 23858-61; Resp. Ex. 723). This policy continued from 1932 until about 1935. Alpha was the first company to remove this policy in Boston and it did so because it discovered that dealers were exchanging domestic and foreign cement and thereby making it ineffective. The evidence shows that Alpha eliminated this policy at Boston without consulting any competitor (Tr. 23867-68).

19. Exception is taken to the phrase "as to meetings and communications with competitors Com. Exs. 1496 A to C; 1965 A; 2370 A, B; 3005 A" because it erroneously implies that Alpha has been a party to improper or illegal agreements or understandings with competitors. Neither

the references cited in this paragraph or any evidence supports such an inference.

Com. Exs. 1496 A to C is a memorandum by Cree, a discharged Aetna employee, of a meeting in November, 1933, on the question of trucking in Michigan. This meeting was held in an attempt to agree on a provision regarding trucking to be inserted in the NRA code. No agreement was reached and no change in the Alpha policy followed the meeting (Tr. 23723-24; 25811-15).

Com. Ex. 1965 is a letter from Medusa calling a meeting of cement and railroad executives in March, 1932 to discuss the question of reduced short-haul railroad rates. There is no evidence that any action was taken or agreement reached.

Com. Ex. 2370 is a letter as to a meeting of cement manufacturers to discuss the question of a patented cement called "Ineor" which has no reference to standard cement involved in this case.

Com. Ex. 3095 is minutes of a meeting of the Portland Cement Association at which certain resignations from membership were received and withdrawn and the promotion policy of the Association and its dues basis were discussed.

Exception is further taken to the failure to report the evidence on this subject as follows:

The officers and employees called as witnesses for Alpha testified that they had various trade association meetings and that they frequently met officers of competitors informally and socially; that on such occasions industry problems were sometimes discussed; but that at none of them had there been any understanding or agreement as to Alpha's future policy (Tr. 23336-40; 23721; 24284-89; 24315-20; 25811-15; 25933-34). There was no evidence contradicting or conflicting with this testimony and no evidence that at any meeting attended by representatives of Alpha any improper or illegal agreement or understandings were arrived at.

20. Exception is taken to the failure to report the following evidence concerning Alpha's membership in the Cement Institute:

One of the principal reasons why Alpha joined The Cement Institute in 1929 was to secure a Trade Practice Conference under sponsorship of the Federal Trade Commission (Tr. 23877-78; Resp. Ex. 725). In addition, Alpha believed that The Cement Institute should carry on the work of The Cement Manufacturers Protective Association which had been approved by the United States Supreme Court (Tr. 23878). When the Trade Practice Conference did not materialize and numerous other manufacturers resigned from the Institute during the 1931 depression, Alpha also resigned (Tr. 23889). During the period from 1931 until 1933 Alpha had no connection whatever with The Cement Institute. Following the passage of the N.I.R.A. industries were requested to form organizations to prepare and submit codes of fair competition and for that reason, Alpha rejoined The Cement Institute in 1933 (Tr. 23923).

There was never any attempt to enforce the Code of Ethics of The Cement Institute (Tr. 23898-99). Alpha took no action with respect to the Compendium and the company's marketing practices were not in any way changed following publication of the Compendium (Tr. 23942).

The contract reporting and the various statistical services made available to Alpha by The Cement Institute were used solely for the purpose of securing valuable information about Alpha's status in the markets and to prevent fraudulent violations of contracts by their customers (Tr. 23901-05; 23907; 23917-23). The testimony of the witness, Coogan, showed that Alpha was never a party to any understanding, agreement or arrangement with competitors regarding control of production of cement or allocation of shipments (Tr. 25006; 25027-28).

The Alpha Company has used freight rate books since about 1910. It was one of the first companies to prepare its own freight rate books (Tr. 23234-35).

Alpha subscribed to the freight rate service of The Cement Manufacturers Protective Association between 1915 and 1924, to the Midwest Statistical Bureau when it was in existence and to the National Traffic Bureau from 1929

until the formation of The Cement Institute (Tr. 23264-68). Alpha has also subscribed to the Institute rate books during the period of Alpha's membership (Tr. 23233-34; 23268). The Institute rate service is used by Alpha in order to secure accurate freight rate information more conveniently and economically than it would be able to do were it to compile its own freight rates. Should the Institute service be discontinued, however, Alpha would compile its own rate books (Tr. 23272-76; 23235-72). The witness, Coogan, testified there was no agreement between Alpha or any cement manufacturer with respect to the use of the Institute freight rate books (Tr. 23276).

Paragraph 9

(Arkansas)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Arkansas Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Arkansas is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the implication in Paragraph 9 that the practices and policies of Arkansas conform to or are interrelated with the practices and policies of Colorado, Nebraska, Oklahoma, Three Forks and Union, or any of them; and to the failure to report the evidence showing that the policies and practices of Arkansas are formulated independently of the policies and practices of

the other Ideal affiliates; that there is no arrangement whereby the prices or commercial practices of each of the companies is maintained on the same basis; and that none of the named companies has anything to do with the determination of matters of policy or practice of any other company (Tr. 13889-90; 41967-68; 42117-18; 46441-42).

4. Exception is taken to any implication that the policies and practices of Arkansas have been adopted or carried on as the result of understanding or agreement with any other respondent. Further exception is taken to the failure to report that the general sales manager of Arkansas appeared as a witness and testified in full regarding the development and use of the companies practices and policies, showing that Arkansas had not adopted and used any policy or practice as the result of understanding or agreement with any competitor (Tr. 46439-42; 46498; 46501; 45613; 46515-19; 46534-35; 46535-37; 46539; 46542; 46544-45; 46553; 46560; 46562; 46564; 46570-71).

5. Exception is taken to the failure to report the following evidence concerning the Arkansas Company generally:

Arkansas has one mill located at Okay Junction, Arkansas which went into production in 1928, with an annual capacity of about 550,000 bbls. Improvements have since increased its capacity to 1,100,000 bbls. per year.

Demand in the area where it sells depends largely on the seasons. Shutdowns occur, accordingly. There have been occasions, although not within recent years, when the plant has operated at maximum capacity (Resp. Ex. 3583; Tr. 46564-66).

6. Exception is taken to the failure to report the following evidence regarding Arkansas' membership in The Cement Institute:

Arkansas was not a member of the Institute from February 28, 1936, until early in February, 1937 (Resp. Ex. 127 C; Com. Exs. 561, p. 10; 1033 c). The Cement Institute has never participated in or had anything to do with the

formulation of any of the policies of the Arkansas Company (Tr. 46570-71). Arkansas has never received or used Cement Institute freight rate books (Tr. 46513-14; 46515-19).

7. Exception is taken to the failure to report that Arkansas' delivered price on Com. Ex. 180 (cited in Paragraph 9) was the current commercial price for cement at that point and that the railroads furnished bidders with land grant rates available to the government (Resp. Exs. 859; 897; Tr. 46534; 25366-67; 31894-95). Com. Ex. 452 A cited in Paragraph 9 as an identical bid has never been received in evidence.

8. Exception is taken to the failure to report the following further evidence relating to bids of the Arkansas company:

Sales by Arkansas to governmental agencies amount to less than 1 per cent of its total sales (Tr. 46529). The company has submitted bids which were not identical with those of its competitors on April 17, 1930 (Com. Ex. 773); Oct. 28, 1930 (Com. Ex. 779); Feb. 10, 1931 (Com. Ex. 781); Nov. 9, 1932 (Com. Exs. 187 A; 188 D); Sept. 20, 1933 (Com. Ex. 790; Resp. Ex. 1074); Nov. 14, 1933 (Com. Ex. 791); and April 3, 1934 (Resp. Ex. 1319).

Except on the occasion of the Procurement Division invitation of April 1938 Arkansas has always quoted the federal government f.o.b. mill when so requested. The company did not bid at all in response to the April 1938 invitation because it was indefinite in all respects. Prior to July, 1937 federal agencies in Arkansas' marketing territory seldom if ever called for f.o.b. mill bids. When they did, Arkansas bid as requested (Com. Exs. 171 A-B; 173 G; 180 A-B; 181 C; 773; 779; 781; 187 A; 188 D; 790; 791; 792; Resp. Ex. 1074; Tr. 46525-29; 46537).

There are some points in Arkansas' marketing territory to which shipments from Okay Junction move over land grant railroads. When the federal government calls for bids at some point to which land grant rates apply either from Okay Junction or from some competitive mill,

Arkansas quotes so as to enable the government to obtain the full benefit of the land grant deduction to which it is entitled (Tr. 46530-33).

Prior to July, 1937, Arkansas, where land grant rates were involved, quoted the federal government either an f.o.b. mill price derived by deducting its freight rate, land grant or commercial, from the lowest destination cost it could arrive at, or a destination cost with a "control clause" whereby the government deducted the freight rate to arrive at an f.o.b. mill price (Tr. 46525-26; 46532-33). Arkansas learned of the "control clause" through a Code Authority notice of prices filed and used it from time to time thereafter. The evidence shows that the company had no agreement or understanding to adopt or use the "control clause" (Tr. 46535-36).

Arkansas obtains land grant rate information it uses in quoting the federal government from railroads, from its traffic department or from official tabulations of bids previously taken at the same destination (Tr. 46534).

Askansas has never consulted with any competitor regarding land grant rates nor has it ever agreed with any competitor with regard to what land grant rates were to be used in connection with any government business (Tr. 46534-35).

Arkansas was not a member of The Cement Institute during the period of operation of the Institute land grant rate service (Resp. Ex. 127 C; Com. Exs. 561, p. 10; 1033 c).

9. Exception is taken to the failure to report the following evidence concerning the pricing policies of the Arkansas company:

Except as indicated in Exception No. 8, *supra*, it is and always has been the policy of the Arkansas company to quote prices at destination. Aside from requests of the federal government for an f.o.b. mill price and an occasional request on the part of the railroads for such quotation, Arkansas has never had a request from any customer for f.o.b. mill prices (Tr. 46484-85; 46536). The testimony of the sales manager showed that the company has never

had any understanding or agreement of any kind with any competitor that they would not quote f.o.b. mill prices (Tr. 46536).

It has always been the policy of Arkansas to at least meet the lowest prices it finds quoted by any competitor at destinations where it sells. It learns of competitors' prices from its customers and salesmen (Tr. 46617-19; 46626-27). Arkansas has always kept a master price list of its current prices at every destination in its sales territory. Such records are used as a ready reference to quote prices (Tr. 46484-88). Each of its salesmen is furnished with a list of the company's current prices at all destinations in the particular salesmen's territory and the salesmen are not supplied with any other price information (Tr. 46488-90; Resp. Exs. 3577 A-Z24).

Arkansas also keeps a list of so-called price bases which after deduction of freight from delivered prices appear to be reflected in prices being quoted by competitors. It uses this list only at times of price change as a guide in sending out its own quotations (Tr. 46493; 46497; 46626-27). The testimony shows that Arkansas has never had any agreement or understanding with any of its competitors as to which mills should be considered base mills and which should not. It has never received lists of price bases from any competitor nor has it ever sent a copy of its own price base list to any competitor (Tr. 46498-500).

The prices which Arkansas broadcasts to its customers and prospective customers and the prices appearing on its office and salesmen's price lists are the prices at which Arkansas tries to sell its product. The company has, however, on many occasions, sold cement to particular customers at prices less than those so published in order to meet prices quoted by competitors. Such sales have always been frequent and general in extent throughout Arkansas' marketing territory (Tr. 46493-96).

Arkansas has always secured the freight rate information it uses in checking competitive prices, in making up quotations for broadcast to the trade and in shipping cement, from freight rate books compiled by its own traffic department (Resp. Exs. 3578 A-Z67). The company uses

freight rate compilations to enable it to meet prices promptly. This would be impossible if it had to resort directly to official railroad tariffs. Arkansas has never received or used Cement Institute freight rate books (Tr. 46501-19; Resp. Exs. 3578 A-Z67).

10. Exception is taken to the assertion that the dealer policies of Arkansas are "uniform" because there is no evidence of any "uniformity". Further exception is taken to the failure to report the following evidence concerning the dealer policies of the Arkansas company:

Arkansas has always had a policy of selling cement at dealer prices to dealers and to certain other types of customers including the United States Government. Its policy regarding dealer sales and other sales at dealer prices differs from those of its competitors (Com. Ex. 873 i; Tr. 46537-39; 46550-52).

While Article XI of the NRA Cement Code was in effect, Arkansas followed the policies set forth therein which were substantially identical with the policies it had been following ever since it had been in business. The suspension of Article XI had no effect in Arkansas' policies. The evidence shows that the company had no agreement or understanding with any competitor to continue in force the provisions of the suspended Article (Tr. 46537-39).

The Arkansas company first published an announcement of its dealer policy to the trade in March, 1935. Prior thereto, competitors had sent announcements of policy to the trade. As a result Arkansas' dealers continually requested it to state what action it intended to take with regard to its policy. Arkansas finally decided to meet the competitive condition brought about by the announcements of its competitors and on March 6, 1935, sent out an announcement of its own policy. The evidence shows that this announcement was not issued as the result of any understanding or agreement with competitors, with dealers or with dealers or lumbermen's associations (Com. Ex. 873 M; Tr. 46537; 46539-42; 46544-45; 46553).

Early in April, 1935 competitors had canvassed the trade with new announcements of policy more favorable to the dealers than the policy Arkansas had been follow-

ing. At the insistent demand of its dealers, and on April 10, 1935, Arkansas issued its own announcement of policy to meet the new competitive conditions. The sales manager of the company testified fully regarding all the circumstances surrounding the development of these several policies and showed that Arkansas did not adopt or use them as the result of agreement or understanding with any competitor, dealer or dealer association (Com. Ex. 873 i; Tr. 46545-60); and further that Arkansas has never had any agreement or understanding with any competitor, dealer or dealer association with regard to whom it would or would not recognize as a dealer. The Company has always maintained a list of the dealers it considers qualified to retail its product efficiently. Each salesman is supplied with a list of such dealers in the territory in which he works. The lists are corrected and kept up to date on the basis of daily salesmen's reports. Arkansas has never exchanged such lists with any competitor (Tr. 46560-64).

Tr. 46439-71 cited with regard to dealer policies of the Arkansas company bears no relation to that subject.

11. Exception is taken to the implication that Com. Exs. 2242-7 and 3305 D bear on the connection of Arkansas with meetings, on the ground that none of the exhibits referred to show that Arkansas was involved in any meeting. Further exception is taken to the failure to report the evidence showing that no action ever was taken on the proposals referred to in Com. Exs. 2242-47, and that no agreement, understanding or collusion resulted therefrom (Com. Exs. 1125 D-F, 3176 X, 9764 J; see also Exception No. 5 to Paragraph 178, *infra*).

Paragraph 10

(Ash Grove)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Ash Grove Lime & Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices

of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for farther regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Ash Grove is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 10 that the policies and practices of Ash Grove have been adopted or carried on as the result of understanding or agreement with any other respondents. Exception is taken to the failure to report that the testimony of the president of Ash Grove shows that Ash Grove has not adopted or used any of its policies and practices as the result of agreement or understanding with any of its competitors (Tr. 13583; 13595-97; 13624; 13631; 13641; 12644; 13676-79; 13736-37; 13711; 14439; 47630; 47633-34).

4. Exception is taken to the failure to report the following evidence with respect to the Ash Grove company generally:

None of the officers or directors of Ash Grove is or ever has been connected with any other respondent.

All cement sold by the respondent, Ash Grove, is manufactured at its cement mill at Chanute, Kansas. The mill is situated in close proximity to its deposit of raw material; it went into production in 1908; its capacity is about 1,750,000 barrels annually.

Ash Grove maintains sales offices in Omaha, Nebraska and in Oklahoma City, Oklahoma. In its marketing territory Ash Grove comes into competition with the cement mills of fourteen other independent producing companies. Ash Grove travels salesmen in all of the territory in which it solicits business (Tr. 13575-77; 47632-33).

5. Exception is taken to the failure to report the following evidence regarding Ash Grove's membership in the Institute:

Ash Grove has a well-equipped traffic department consisting of a traffic expert and several able assistants. Ash Grove's traffic department has nothing to do with prices; it furnishes the sales department with freight rates to all destinations in Ash Grove's marketing area from all mills with which Ash Grove comes into competition; it receives and keeps a complete file of official railroad tariffs covering its sales area and prepares its freight rate information direct from this file.

Ash Grove has never used The Cement Institute freight rate books in determining prices or as a freight rate authority; as a member of the Institute Ash Grove has received some of its freight rate books, but has used them only for occasional checking against its own freight rate books. If Ash Grove discovers any error in its own freight rate books it determines the correct rate by reference to the official tariffs.

Ash Grove's salesmen have never carried any freight rate books; Ash Grove has always provided its salesmen with price lists for all of the towns in which they solicit; these lists have never contained any mill points or head line points of shipment (Tr. 14434; 14439; 13709-11; 13714).

6. Exception is taken to the failure to report the following evidence with respect to the pricing policies of Ash Grove:

The president of Ash Grove testified that he has been in the cement business for 52 years, 22 years as a jobber-distributor and 30 years as a manufacturer; when he operated as a jobber prior to the Elkin's amendment to the Interstate Commerce Act he purchased cement from the manufacturer, sometimes f.o.b. mill and sometimes f.o.b. destination, depending upon which way he could obtain the lowest delivered cost; freight rates in those early days were not published or adhered to by the railroads and frequently special rates could be obtained; since the late 1890's he purchased cement as a jobber, at destination prices; all

of his sales as a jobber were made at delivered prices; he found that his customers always purchased cement on the basis of the lowest cost at destination at which they intended to use it (Tr. 13579-81; 13729-30).

The evidence shows that since Ash Grove has been manufacturing cement it has found that there is no market for cement at its mill; the market for cement is at the point where the customer is located; the competition it must meet includes the cost of shipment to destination (Tr. 13718-19; 13714; 13644). Ash Grove's sales, except where land grant rates were involved, have ordinarily been made at destination prices. Ash Grove's customers always paid the freight, except in the case of shipments sent prepaid, for the account of Ash Grove and sent the freight bills to Ash Grove as part-payment of the invoice price. Ash Grove's quotations and contract forms have always provided as follows:

> "Where delivered prices are made transportation charges per tariff applies from shipping point to place of delivery shall be paid by the buyer and original paid freight bills sent to the seller promptly for credit" (Tr. 13632-33; 13638; Com. Exs. 2415-A-B).

The evidence shows that Ash Grove has always been free to quote any prices that it chose to; it has always been Ash Grove's policy to try to get as much as it can for its cement and still make the sale; Ash Grove's experience is that it must meet the lowest prices it finds in its sales territory or forego the business. Ash Grove keeps informed as to the lowest market prices through its salesmen who pick up quotations in the field; it checks these quotations back by deducting the applicable freight rates in order to determine whether they reflect any mill bases. Ash Grove meets the lowest prices it finds being quoted, irrespective of whether its analysis of prices reveals any basing point or other pattern and regardless of which mill's quotation proves to be the lowest in any particular market. Ash Grove has issued quotations which were lower than competitors' prices in some of its markets and found that competitors immediately met the lower prices (Tr. 13595-97; 13599; 13640; 13583; 13742-44; 13738).

Ash Grove has never had any foreknowledge as to which mills are basing mills; the only means it has of determin-

ing whether a given mill is a basing point is by analysis of the quotations it finds being made in a given market. Ash Grove has never recognized any particular mill or group of mills as a basing point or non-basing point; the only thing it is concerned with is the lowest prices it finds in any of its markets (Tr. 47633; 13660; 13641).

Ash Grove has found that the demand for cement shifts; sometimes the principal consumption occurs in one area and sometimes in another. Ash Grove has never had any minimum mill net below which it would not take business; whether it accepts business depends on the condition of its order book, the state of the market, prospects for further business and the amount of freight it may have to absorb to meet its competition (Tr. 13597; 13645-46; 13747).

The testimony of the President of Ash Grove shows that Ash Grove has never had any understanding or agreement with any competitor with regard to the establishment, maintenance or recognition of any mill as a base mill, the amount of any mill base or with regard to prices; the company has never had any agreement or understanding with any competitor to quote prices f.o.b. destination or in accordance with any particular method of pricing or marketing (Tr. 47633-34; 13583; 13597; 13500-600; 13641). Ash Grove has quoted f.o.b. mill prices to the federal and state governments (Tr. 13742; Com. Exs. 1026; 1129; 1191; 1884; 1886; 1888; 1890; 1899; 2761; Resp. Exs. 986; 990; 993; 1001; 1009; 1011-12; 2349-Z4; 2351-Z1; 2709).

7. Exception is taken to the failure to report the following evidence with regard to bids and bidding practices of Ash Grove:

Ash Grove quotes on sealed bids in the same manner as it quotes on unsealed bids. Ash Grove has quoted prices which proved to be non-identical with the prices bid by competitors (Com. Exs. 1884; 1886; 2440; Resp. Exs. 1009; 1011-12; Tr. 13744).

Ash Grove's bid on Com. Ex. 166, cited in Paragraph 10 and Paragraph 95 of the Report occurred during the period when the NRA Cement Code was in effect and the invitation to bid required compliance with the Code. The price bid by Ash Grove on this letting had been filed with the

Code Authority by one of the bidders and transmitted by the Code Authority pursuant to the NRA Code to the other potential bidders including Ash Grove. The price bid was over 63¢ less than the commercial market price. Ash Grove did not bid on any of the subsequent readvertisements (Com. Exs. 164 I-J; 167 A; 874 L-N).

Ash Grove's prices bid on Com. Exs. 2493-2507 (cited in Paragraph 10) were the then commercial prices at the destinations involved. All of these prices were submitted in response to invitations calling for f.o.b. destination prices only (Resp. Exs. 3677-85; Com. Exs. 409 J; 3032).

The evidence shows that Ash Grove has never had any understanding or agreement with any competitor with regard to prices on any public contract, state or federal (Tr. 47633-34).

8. Exception is taken to the failure to report the following evidence regarding Ash Grove's dealer policies:

There has been no jobbing of cement by Ash Grove since prior to 1929. Ash Grove's dealers are and have always been the primary outlet for its product; over two thirds of Ash Grove's business has been with the dealer. Dealers selected by Ash Grove carry a general line of building materials as well as cement. Ash Grove does not sell its product at retail; it is unable to give the consumer the same service as its established dealers (Tr. 13577-78; 13732-33; 47632-33).

Ash Grove has been opposed to diversions of its cement in transit ever since it began to operate because diversions have the effect of interfering with its dealers who have spent years building up a market for its product. Ash Grove must protect its dealers or lose their good will. When the president of Ash Grove was a distributor he was opposed to diversions and carried out the same policy when he began to manufacture cement. Ash Grove had no knowledge as to the policy of other cement mills in regard to diversions; its policy in regard to diversions was arrived at independently (Tr. 13734; 13731-32; 13631; 13627; 13744-45).

In addition to its dealers, Ash Grove sells cement direct to contractors, the United States Government and state

governments, counties, railroads, water power and water supply developments, flood control and irrigation projects, concrete and cement products manufacturers, and commercial concrete mixing plants (Tr. 47632-33).

9. Exception is taken to the failure to report the following evidence regarding Ash Grove:

Ash Grove manufactures Standard Portland cement, High-Early-Strength cement and special cements as required by the federal government or other customers, all of which are marketed under its own brand name.

Ash Grove has never engaged in any propaganda concerning its product; it has consistently advertised and still advertises its product on a quality basis and current samples of such advertising were received in evidence; Ash Grove never discontinued or abated its policy regarding quality advertising at any time. None of Ash Grove's competitors ever made any representations to Ash Grove concerning its advertising. Ash Grove has never been able to command any premium in price for its standard cement over other brands (Tr. 13675-76; 13678-79; 13736-37; 13751; 13595; 13640; 47632; 13737; Com. Ex. 2436).

10. Exception is taken to the Trial Examiner's failure to report that Com. Ex. 1131 J (cited in Paragraph 10), refers to a meeting of cement executives called by the Secretary of Commerce of the United States on December 9, 1930. Exception is further taken to the failure to report that Com. Ex. 1131 J, also refers to the difference in terms of sales and discounts in the cement industry and that Ash Grove's terms of sale differed from those of its competitors; Ash Grove never adopted the so-called Lehigh Selling Plan and never interfered with the dealers' resale prices or terms of sale (Tr. 42061-63; 13749-50; Resp. Ex. 986 A). Exception is further taken to the failure to report that other than the meeting referred to in Com. Ex. 1131 J, *supra*, there is no competent evidence that Ash Grove was represented at any meetings other than duly constituted meetings of The Cement Institute.

11. Exception is taken to the citation of Com. Exs. 879 B and 3002 A in Paragraph 10 on the ground that they have no bearing on the Ash Grove Company.

Paragraph 11

(Beaver)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Beaver Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Beaver is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report any of the evidence introduced through three responsible executives of Beaver, namely, D. L. Carpenter, former President and Director of Sales, B. Statler, present President and Director of Sales, and B. C. Nelson, Secretary (Tr. 47763-66).

4. Exception is taken to the failure to report regarding Beaver's operations the evidence which shows the following:

Beaver is a company owning one mill with a relatively small productive capacity; its maximum capacity is 450,000 barrels per annum, but its actual production has ranged from a low of 75,000 barrels per annum to a high of 350,000 barrels per annum (Tr. 47764).

Beaver's normal sales area includes western, central and southern Oregon and some of the northern counties of California. Beaver also ships small quantities of cement into southern Washington (Tr. 47764). The only respondent manufacturers who usually sell cement in markets served by Beaver [illegible] Oregon, Santa Cruz, Pacific, Monro-

lith, and Calaveras. In addition, Beaver has occasion to meet the competition of the non-respondent Cowell and Permanente companies (Tr. 47764).

5. Exception is taken to the reference to Com. Ex. 1207-C and Tr. 8617-18 which accompanied the phrase "as to pricing" in Paragraph 11. Com. Ex. 1207 C, a letter to a customer about certain trade conditions, is a wholly inadequate description of Beaver's pricing policies or practices. Tr. 8617-18 consists of testimony relating to the establishment of a basing point in central California, an area in which Beaver does not market its product. Exception is further taken to the failure to report any of the evidence showing that:

Beaver has found itself unable to sell cement at prices higher than any price currently quoted by a competitor. Therefore, Beaver attempts to meet each competitor's prices wherever they are found. It obtains competitors' prices from competitors' published price lists and from reports from Beaver's salesmen in the field. Beaver's prices have not been determined by reason of any agreement, express or implied, with a competitor (Tr. 47765-66).

6. Exception is taken to any implication of impropriety in the phrase "as to communications". The testimony cited merely indicates that one or two competitors may have placed Beaver on their mailing lists used in distributing to the trade lists of delivered prices. The evidence cited indicates that Beaver does not send its own price lists to competitors (Tr. 8635).

7. Exception is taken to the failure to report regarding bids submitted by Beaver to the federal government the evidence showing:

Land grant rates were furnished to bidders by the federal government in the invitation for bids opened May 17, 1934, referred to in Paragraph 11 (Com. Exs. 161 B; 162 B-C). This letting took place during open price filing under the NRA, the prices bid were filed with the Code Authority. Beaver met the price filed by a competitor (Com. Ex. 163).

Beaver has submitted to the federal government many bids not identical with competitors (Com. Ex. 112; Resp. Exs. 344; 384; 3692; 369; 371; 373). It has also submitted numerous f.o.b. mill bids (Resp. Exs. 233; 369; 3692; 384; 371; 373; Com. Ex. 159). There is no evidence that Beaver ever used the "control clause".

8. Exception is taken to the reference to Com. Ex. 159, and "uniform dealer policies", in Paragraph 11 because the exhibit cited does not relate to the subject of Beaver's dealer policies. Exception is further taken to the failure to report any of the evidence regarding Beaver's marketing policies and practices which shows the following:

Beaver is engaged in selling cement to dealers in large quantities for the purpose of resale and also to certain large consumers, including: federal and state government agencies, railroads, contractors doing certain kinds of work, owners of major waterpower, flood control and irrigation projects, manufacturers of cement and concrete products, and commercial concrete-mixing plants. Beaver does not engage in retail cement sales (Tr. 47764-65).

Paragraph 12

(*Bessemer*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that The Bessemer Limestone & Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Bessemer is "identified" or connected with "group activities" or industry

policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in the report that the acts and practices of the Bessemer company have been adopted or carried on pursuant to agreement or understanding with any other respondent and to the failure to report that the Vice President in charge of sales, the Sales Manager and the Secretary-Treasurer of the company appeared as witnesses and testified fully regarding the operations of the company and the development and use of the company's practices and policies, including those referred to in Paragraph 12; and that this testimony showed that Bessemer's policies and practices were developed and used independently without understanding or agreement with any respondent (Tr. 32015-628; 46157-226; 11317-58; see more specifically below). Charles Schmutz, former Vice President and Sales Manager of the company, whose writings and acts are referred to in the report, was unavailable for testimony on behalf of the company because he died in August, 1936 (Resp. Ex. 3753; Tr. 47975; 32045).

4. Exception is taken to the reference in Paragraph 12 to acts which occurred prior to July 1, 1935 (*e. g.*, Com. Exs. 3305 B-E; 2370; 2823; 178 A) because they concern only a company bearing the same name as the respondent Bessemer which sold all of its assets and went out of business during a reorganization in 1935 and which is no longer in existence (Resp. Exs. 2345; 2346; 3481; 3482; Tr. 46173).

Exception is further taken to the failure to report in this connection that the respondent Bessemer Limestone & Cement Co. (hereinafter referred to as "Bessemer") was not engaged in the cement business, owned no property and had no employees from 1927 to July 1, 1935 and that it was stipulated that "None of the allegations of the complaint filed herein are applicable to the respondent, The Bessemer Limestone & Cement Co., prior to July 1, 1935" (Tr. 32016-17; 46157-73; Resp. Ex. 2346).

5. Exception is taken to the failure to report the following evidence further relating to Bessemer generally:

Bessemer is a small single mill company with a capacity of about 1,800,000 barrels a year (Tr. 32050; 32046-47). Its mill is modern and efficient (Tr. 32047). Further evidence on this subject was rejected by the Examiner (Tr. 32050).

Bessemer markets its cement in a narrow area covering western Pennsylvania, western New York, eastern and southern West Virginia and most of Ohio (Tr. 32063). Its average freight per barrel is $.37 to $.40 (Resp. Ex. 2341). Bessemer must, however, sell at points near competitors' mills to get enough tonnage to operate (Tr. 32086).

6. Exception is further taken to the failure to report the evidence showing that Bessemer has never had any understanding or agreement to allocate territory or to share business and that it has never shipped standard Portland Cement for any competitor (Tr. 32066; 32070; 32219-20).

7. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of Bessemer:

Bessemer's commercial customers desire and request destination prices and invitations for bids by state and federal agencies ordinarily request delivered prices (Tr. 32169; Resp. Ex. 2335). Upon request Bessemer has sold cement to the United States Government f.o.b. mill (Tr. 32161; Resp. Ex. 2307 Q).

The company's policy is to attempt to meet the lowest delivered prices it finds regardless of whether such prices reflect or appear to reflect a price base plus freight (Tr. 32526; 32530; 32626-27). The evidence shows that Bessemer has been wholly free to follow prices it finds or not to follow them and that the company has had no agreement or understanding with any other respondent regarding prices (Tr. 32101; 32098-99; 32104; 32394; 32227; 32321-22). The Cement Institute has never restricted or attempted to restrict Bessemer's action with regard to its prices (Tr. 32227; 32098).

Bessemer obtains its price information from customers and has not received such information from competitors

(Tr. 11349; 32100; 32335; 32350; 32353-54; Resp. Exs. 2337 A-G). When Bessemer quotes prices in an attempt to meet competition it has no assurance that its prices will be as low as the lowest price of any competitor. In fact, its prices have at times been higher than the prices of some competitors and it has found competitors quoting different prices at times (Tr. 32335-36; 32356; 11333; 11339; 11342).

Bessemer has found that there is keen competition on all the substantial elements of price, that the impact of competitive prices has kept and is keeping the level of cement prices down and has prevented Bessemer from increasing prices (Tr. 32094-95; 32081-81½; 32346; 32076).

The company has no fixed practice regarding the notice it will give in the event of a price increase and varies the interval between its date of announcement and the effective date of its new prices to meet the particular circumstances of each case (Tr. 3235-57).

When dealers pay the freight on Bessemer's shipments they do it for the account of the company and Bessemer's invoices provide that "transportation charges . . . will be paid by the purchaser for the account of the Cement Company" (Tr. 32402; 32500; Resp. Ex. 3242 B, D, F, H). Bessemer's account ledgers show the total price invoiced to the customer, including the transportation charges (Tr. 32407). Any claims for damage or loss in transit are handled by Bessemer (Tr. 32408; 82500-01).

8. Exception is taken to the failure to report regarding Bessemer's bids that the company quotes and sells agencies of the federal and state governments at its commercial prices at destination; that it has had no assurance that its prices on sealed bids will be as low as the lowest price of any competitor and that on some bids its prices have been higher than some competitors' prices (Tr. 32322; 32335-36; 32356). There are no land grant rates in the area in which Bessemer sells and the company has never used the "control clause" (Tr. 32173-74).

9. Exception is taken to the failure to report the following evidence regarding Bessemer's membership in The Cement Institute:

Bessemer belongs to The Cement Institute because of the statistical and freight rate services which it receives (Tr. 32224). The company has made no use of the Compendium and has had no agreement or understanding regarding its policies or practices through or by reason of its membership in The Cement Institute (Tr. 32225; 32227; 32098).

Prior to July of 1937 Bessemer prepared its own freight rate information for the use of its sales force. It has used the Institute's rate books for checking purposes only. In the case of any doubt as to the correct rate, Bessemer always checks and uses the official tariffs (Tr. 11332-33; 32359; Resp. Exs. 2339 A-C; Tr. 11351-52). The company has found the Institute freight rate books more economical than would be the maintenance of its own rate books (Tr. 32364-68).

10. Exception is taken to the failure to report the following evidence regarding delivery of cement by Bessemer:

The evidence shows that Bessemer has had no agreement to eliminate trucking and that the company has never charged a 15¢ per barrel loading charge for truck delivery (Tr. 32288). The company has found delivery to customers' trucks at its warehouses is a highly unsatisfactory method of doing business and that its customers generally are opposed to this method of delivery (Tr. 32284-85; 32265-66; 32283). Further evidence of customer opposition to trucking was rejected by the Trial Examiner (Tr. 32287-88).

Bessemer does make truck deliveries of cement to some of its markets but has found that such shipments do not result in any savings to the company (Tr. 32252; 32254-55; 32257-60; 32264; Resp. Exs. 2288-2294).

11. Exception is taken to the failure to report the following evidence regarding the policies and practices of Bessemer as to direct and dealer sales:

Bessemer has never announced to the trade a classification of its customers or a definition of a dealer. Each

sale depends upon its own facts (Tr. 32190-91; 32138; 32180-81; 32183-86). The company's primary outlet for its cement, however, is the dealer (Tr. 32180; 32186).

The attitude of Bessemer's dealers has always been important and has been considered in determining the company's marketing policy (Tr. 32582-83; Resp. Ex. 2312). Bessemer has never received communications from associations or dealers, however, which influenced or attempted to influence the company in its choice of dealer outlets (Tr. 32182). Evidence to show that Bessemer has sold cement and shipped to dealers at points where they do not have warehouses was rejected by the Examiner (Resp. Ex. 3116 A for id.).

The evidence shows that Bessemer has had no agreement concerning its selection of dealers or concerning which customers it will sell direct (Tr. 32182; 32185; 32199; 32416; 32208). The company has found competitors selling direct, business which Bessemer has sold through dealers. The company has sold direct on WPA business (Resp. Exs. 2312-15; 2318-19; Tr. 32191-93; 32408; 32207-08; 32197-99). Evidence to show that Bessemer found competitors selling direct on business which Bessemer was selling through dealers was rejected by the Trial Examiner (Tr. 32216-17).

12. Exception is taken to the failure to report that Bessemer does not come into competition with imported cement (Tr. 32174).

13. Exception is taken to the failure to report the testimony showing that Bessemer has had no agreement with any competitor regarding its terms of sale (Tr. 32175).

14. Exception is taken to the implication in the reference to Com. Exs. 2370 A-B and 2305 D that the respondent Bessemer participated in any meetings prior to its entry into the cement business in July, 1935, on the ground that this is contrary to the evidence.

Transcript 3039-3436 covering 437 pages has no bearing whatever on Bessemer. Resp. Ex. 2347 is not in evidence. It was excluded by the Trial Examiner.

Paragraph 13

(Calaveras)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Calaveras Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 4-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Calaveras is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the vice-president and general manager, the treasurer and the secretary of the Calaveras company testified as witnesses on its behalf and denied that the company has ever had any agreements with anyone regarding any of its practices or policies. (Tr. 42847-54).

4. Exception is taken to the failure to report the following evidence regarding the history and organization of the company and the area in which it markets its cement:

The preferred stock of the Calaveras company is owned by 294 separate stockholders and the common stock is owned by 370 separate stockholders. No stockholder owns a controlling interest in the company and none of them has any connection with any other cement company (Tr. 42850).

None of the company's officers or directors are officers or directors of any other cement company (Tr. 42850-51).

All of the cement sold by Calaveras is manufactured at Kentucky House, California, where its manufacturing

plant and deposits of raw materials are located. The plant is situated 50 miles from Stockton, California, and 150 miles from San Francisco. The mill has a capacity of 1,200,000 barrels per annum (Tr. 8681; 42851-52).

The company's principal market is in southern and central California, although a small amount of its cement is marketed through dealers in Nevada and southern Oregon. It sells no Portland cement in southern California. In addition, the company bids on municipal, county, state and federal projects at times in various parts of California, Arizona, Nevada, Oregon and Washington, depending upon the attractiveness of the business (Tr. 8681-82; 42852).

Calaveras covers its sales area at the present time by 12 salesmen located at points scattered throughout the area. The company sells its cement in competition with the mills of 12 companies, all of which are located in the states of California and Oregon (Tr. 42852-53).

5. Exception is taken to the citation in Paragraph 13 of Com. Ex. 661 D because that exhibit is not in evidence.

6. Exception is taken to the failure to report the following evidence regarding the membership of Calaveras in The Cement Institute:

The company joined The Cement Institute in September, 1933, because it was the vehicle through which an NRA Code for the cement industry was being drafted pursuant to N.I.R.A. Calaveras was never a member of the Institute prior to the official cancellation of the Institute's Code of Ethics (Com. Ex. 614-D; Resp. Ex. 2174-C; Tr. 8758-59; 16699; 16927-29).

The company has never participated in any of the services of the Institute, statistical or otherwise. The Institute has never published freight rate books for any of the territory in which the company markets its cement and Calaveras has never received or used any of the rate books that the Institute does publish (Com. Exs. 595-C, D-E; Tr. 2809; 3156; 8759; 16710-11; 16852-53; 42852).

There is no evidence that the Institute formulated or interpreted or attempted to formulate or interpret any of the policies or practices of the Calaveras company.

7. Exception is taken to the failure to report in connection with Calaveras' bid of May 17, 1934 referred to in Paragraph 13 that this bid was made during the period when open price filing provisions of the NRA cement code were in effect; that the price this company bid was the destination cost for Bonneville, Oregon, on file with the NRA Code Authority for the cement industry; and that this price was 64c less than the current commercial price to dealers at that destination (Com. Ex. 162 B cited; Com. Exs. 1631; 2097).

8. Exception is taken to the failure to report in connection with Calaveras' bid of Feb. 21, 1935 referred to in Com. Ex. 111 F that this bid was also made during the effective period of price filing provisions of the NRA Cement Code; that the price Calaveras bid was the destination cost at Adair, Washington, on file with the NRA Code Authority for the cement industry; and that this price was 36c less than the current commercial price to dealers at Adair (Com. Exs. 277 N; 2127).

9. Exception is taken to the failure to report that on the letting of May 3, 1937, referred to in Com. Ex. 120 B, there were six bidders including Calaveras and that the bid of the Calaveras company was identical with the bid of one other bidder and non-identical with the others (Com. Ex. 120 B).

10. Exception is taken to the statement that Calaveras made a joint bid with five others on March 26, 1934 on the ground that it is contrary to the evidence. Com. Ex. 134 C which is a tabulation of bids taken on March 26, 1934 for Boulder Dam requirements shows that bids were submitted by Riverside, California, Southwestern, Mono-Eth, Calaveras and Union. Com. Exs. 134 D-E indicates that the first four companies mentioned submitted a joint bid. Com. Exs. 134 F-G shows that Union submitted a separate and individual bid and Com. Ex. 134 C shows that Calaveras likewise submitted a separate and individual bid. Exception is further taken to the failure to report that all of the bids submitted were f.o.b. mill bids and that the bid of the Calaveras company was not identical in any

respect with the bids of any of the other bidders (Com. Ex. 134 C; see also Tr. 1366-68).

11. Exception is taken to the further failure to report the following evidence regarding bids and bidding practices of the Calaveras company:

On large sales to governmental agencies, the company has always quoted prices which were less than the prices it was currently quoting to its commercial trade (Tr. 8761-62).

The prices the company has bid to governmental agencies have usually been non-identical with those quoted by other bidders (Com. Exs. 120 B; 129; 134 C; 1099 A; 1339; 1381; 1382; 3212 A-3E; 3214 A-5A; Resp. Exs. 233 A-B; 264 D, H; 384 A-C; 3692; Tr. 1367-68; 10038; 10234-36; 10270-71). Calaveras has also frequently bid f.o.b. mill prices to such agencies (Com. Exs. 129; 134 C; 1099 A, D; 1339; 1381; 1382; 3212 A, G; Resp. Exs. 264 D, H; 384 A-C; 3692; Tr. 1367-68; 10038; 10234-36; 10270-71). The Trial Examiner rejected further evidence regarding f.o.b. mill and non-identical bids of the Calaveras company (Resp. Exs. 3660-Z15-Z17 for id.; Tr. 47700-04).

Calaveras has never had any agreement with any competitor to make the same bid for any public contract (Tr. 42854).

12. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of the Calaveras company:

It is the company's general practice to sell its cement at delivered prices. In the area around its mill to which its freight rates are lower than the freight rates from competitive mills, its prices reflect a uniform figure at its mill. At all other destinations at which the company tries to sell cement, it meets the lowest prices being quoted by any competitor. It has been the company's experience that it must at least meet the lowest price quoted by any competitor or else not sell any cement. It does not generally quote lower prices than it believes its competitors are quoting because it has found that any gain in volume

it realizes thereby is only temporary and of very short duration because its competitors meet the lower prices as soon as they learn of them (Tr. 8682; 8713-14; 8718). Nevertheless, Calaveras has always, at one time or another, sold its cement to its commercial trade at prices less than those it is currently quoting to its trade (Tr. 8761-62; Com. Ex. 1267 B).

The company's salesmen are continually calling on dealers and other consumers and through them the company keeps in touch with market conditions. The company learns in this manner the prices its competitors are quoting and whether or not they are undercutting prices currently being quoted by Calaveras (Com. Ex. 1267 B; Tr. 8714).

Calaveras has never had any agreement with anyone to use any particular system or method of pricing nor has it ever had any agreement with any competitor to quote the same price as such competitor for cement at any place or to any customer (Tr. 42853-54).

13. Exception is taken to the failure to report the following evidence regarding the trucking policies and practices of the Calaveras company:

Calaveras makes some deliveries to customers' trucks at its mills at f.o.b. mill prices. It also makes deliveries itself by truck to towns near its mill charging its current delivered price therefor. It has always found that the cost to it of delivering cement in trucks is greater than the cost of delivering by rail. To many points, the cost of truck delivery is 1c per cwt. higher than rail delivery. The company has at all times absorbed these additional costs (Tr. 8682-83; 8760-61).

14. Exception is taken to the failure to report the following evidence regarding dealer policies of the Calaveras company:

The company markets approximately 50% of its output through dealers. It also sells cement to the United States and State governments, railroads and railroad contractors, contractors doing paving and bridge work for the United States and State governments, owners or contractors pur-

chasing for major water development, power development, flood control projects and irrigation districts, manufacturers of cement and concrete products, and commercial concrete mixing plants (Tr. 42852).

Calaveras has never had any agreement with anyone to use any particular system or method of marketing cement. (Tr. 42853).

15. Exception is taken to the citation of Tr. 8763 in connection with dealer policies of the Calaveras company because it does not relate to the Calaveras company. Exception is further taken to the citation of Tr. 8634-37 and 8786 in connection with "communications" of the Calaveras company because they are not concerned with and have no bearing on communications of the Calaveras company.

Paragraph 15

(Castalia)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Castalia Portland Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited. **(See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).**

2. Exception is taken to the assertion in Paragraph 82 and the footnote to page 9 that Castalia is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication that any of the acts or practices of Castalia have been adopted or carried on pursuant to agreement or understanding with any other respondent on the ground that it is not supported by the evidence. Exception is further taken to the failure to

report the testimony of Chester Millard, an executive of the company (Tr. 47670-76).

4. Exception is taken to the statement that Castalia has since July 1932 "sold cement made by Medusa" because the evidence shows that Medusa discontinued selling cement to Castalia in December 1937, and only sold 115 barrels to Castalia in 1937 (Tr. 47673-74; 40552).

5. Exception is taken to the implication that Castalia attended the meeting referred to in Com. Ex. 1965 A-B because the evidence shows that Castalia was not present (Resp. Ex. 3265).

6. Exception is taken to the statement that "Castalia sold and shipped cement from Castalia, Ohio, into the States of Michigan, West Virginia and elsewhere outside of the State of origin," on the ground that it is not supported by any evidence including Com. Ex. 3121 A-H, cited.

7. Exception is taken to the further failure to report the following:

Castalia is out of business and its plant has been dismantled and sold (Tr. 37766-67; 47674-75; 49114; Com. Ex. 2084 A; Resp. Ex. 3439 A). The company has been in bankruptcy; the Trustee is liquidating all the assets, and Castalia does not plan to ever return to the cement business (Tr. 47674; 47676).

8. Exception is taken to the failure to report regarding Castalia's membership in The Cement Institute, that there is no evidence that any employee of Castalia ever attended an Institute meeting after 1930; and that Castalia's attempts to resign from the Institute in 1935 and at later dates were ineffective only because all back dues were not paid (Tr. 47674-75; Resp. Exs. 3439 E-G).

9. Exception is taken to the failure to report that Castalia sold cement to trucks f.o.b. its mill since 1898 (Com. Ex. 3121 D) and that it has also shipped by truck (Resp. Ex. 1782).

10. Exception is taken to the failure to report that the only bid made by Castalia was in April 1929, on which occa-

sion, some of Castalia's competitors bid lower than it did at some points and it bid lower than some competitors at other points (Com. Ex. 1877); and that the evidence, generally, shows that Castalia has quoted prices lower than competitors (Tr. 11342-43).

11. Exception is taken to the implication that Castalia has attended meetings generally and to the failure to report that the only meeting other than an Institute meeting in 1930 ever attended by any representative of Castalia was a meeting of the American Association of Portland Cement Manufacturers in 1911 (Com. Exs. 3235-Z108, cited).

Com. Ex. 3128; Resp. Exs. 3065 A-F; Tr. 14808-15; 14817-23, all cited in Paragraph 15 have nothing to do with Castalia.

Paragraph 16

(Colorado)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9 that Colorado is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Colorado is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the implication in Paragraph 16 that the practices and policies of Colorado conform to or are interrelated with the practices and policies of Arkansas, Oklahoma, Nebraska, Three Forks and Union, or any of them, and to the failure to report the evidence showing that the policies and practices of Colorado are formulated

independently of the policies and practices of other Ideal affiliates; that there is no arrangement whereby the prices or commercial practices of each of the companies is maintained on the same basis; and that none of the named companies has anything to do with the determination of matters of policy or practice of any other company (Tr. 13889-90; 41967-68; 42117-18; 46440-42).

4. Exception is taken to any implication in Paragraph 16 that the policies and practices of Colorado have been adopted or carried on as the result of understanding or agreement with any other respondent, on the ground that it is not supported by the evidence.

5. Exception is taken to the failure to report the following evidence with respect to Colorado's membership in The Cement Institute.

The Colorado Company did not become a member of The Cement Institute until after the Institute's Code of Ethics drafted in 1929 had been officially cancelled (Resp. Exs. 2173 B-C; 2174-C; Tr. 13844; 16699; 16927-29; see also Exception No. 6 to Paragraph 1, *supra*). It resigned from the Institute on February 28, 1936, and was not a member again until early in February 1937, when it withdrew its resignation (Resp. Ex. 127-C; Com. Exs. 561, p. 10; 1033-C).

Colorado has always used freight rate books compiled from official tariffs by its own traffic department and has never used Cement Institute rate books in connection with the pricing or shipping of its products (Tr. 13899-901). It never participated in any of the statistical services of The Cement Institute (Com. Exs. 595-C; 3113; Tr. 2809; 16710-11).

6. Exception is taken to the erroneous and unsupported implication in the reference to Com. Exs. 1270-B-J, 136 and 137 that Colorado participated in Institute meetings in 1930 or 1931. There is no showing on the face of these exhibits or elsewhere in the record that Colorado was represented at any of these meetings. Exception is further taken to the implication in the reference to Com. Ex. 138 that Colorado was a member of the Institute at the time the Articles of Association and Code of Ethics represented by this exhibit

were in existence (Resp. Exs. 2173 B-C; 2174 C; Tr. 13844; 16699; 16927-29). The evidence shows that Colorado did not become a member of the Institute until June of 1933 (Resp. Exs. 2173 B-C; Tr. 13844; 16699; 16927-29).

7. Exception is taken to the failure to report the following evidence relating to bids of the Colorado Company:

Colorado has submitted bids which were not identical with those of its competitors (Com. Exs. 125 B; 119 B; 1341; Resp. Exs. 384 A; 3692; Tr. 10263-64; Resp. Exs. 2997; 384 B; Tr. 10270; 10271-72); and has submitted f.o.b. mill bids to the federal government (Com. Exs. 175 A; 125 B; 119 B; 1341; Resp. Exs. 384 A; 3692; Tr. 10010-15; 10263-64; Resp. Exs. 2997; 384 B; Tr. 10270; 10272). Further evidence to the effect was rejected by the Examiner (Resp. Exs. 3660-Z21-Z24, Z27-Z29 for id.; Tr. 47700-04).

Paragraph 17

(Consolidated)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Consolidated Cement Corporation is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorzied and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Consolidated is "identified" or connection with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 17 or elsewhere in the Report that the practices and pol-

icies of Consolidated have been adopted or carried on as the result of understanding or agreement with any other respondent on the ground that there is no evidence to support it. Exception is further taken to the failure to report that responsible executives of the Consolidated company appeared as witnesses and showed that Consolidated has had no such agreement or understanding (Tr. 47569, *et seq.*; 13321, *et seq.*; 29898, *et seq.*).

4. Exception is taken to the failure to report the following evidence regarding the Consolidated company generally:

Consolidated went into receivership in 1931 and was reorganized under Section 77B of the Bankruptcy Act as of May, 1934 (Tr. 13340-41).

The company's principal marketing area is divided into two parts: the Michigan plant markets cement in the Lower Peninsula of Michigan, in northern Indiana, northern and western Ohio, and to some extent in Illinois; the Fredonia plant markets cement in Kansas, western Missouri, Arkansas, Oklahoma, parts of Nebraska and parts of Texas. The company comes into competition only with the limited number of respondents who sell in those areas. It has found it necessary to abandon some of its earlier markets because of lower prices introduced by new mills and keener competition in those areas (Tr. 47582-86; Com. Exs. 970, 7V-W, 7Y).

Evidence showing that in recent years Consolidated has made renewals and improvements in its mills other than repairs and the extent of such improvements was rejected by the Examiner (Tr. 47581).

5. Exception is taken to the failure to report that Consolidated rejoined the Institute in June 1933, in order to participate in the emergency NRA legislation, and that Consolidated does not use the Institute rate books (Tr. 30242-45; 13371-72).

6. Exception is taken to the inadequate and misleading reference to the pricing methods of Consolidated and to the failure to report evidence relating thereto including the following:

Consolidated's policy is to offer its cement delivered on terms and conditions that are either as favorable or more favorable than other competitors at the same place and at the same time. Information regarding competitors' prices is obtained from the field. The company's salesmen are furnished with lists of the company's prices at all destinations where they sell. (Tr. 47586-88). The company has not always adhered to its published commercial prices (Tr. 47611-14; 47588-91).

In attempting to meet competitive prices at destinations Consolidated never has any assurance that its own price will be as low as the lowest quoted by any competitor. It can only tell by the subsequent daily checking of its sales force and advice from customers (Tr. 47617-18). The company sells in areas where prices do not reflect any base figure. Moreover, the patterns of prices which do appear in parts of its sales area vary from time to time (Tr. 47615).

7. Exception is taken to the failure to report the following evidence regarding bids of Consolidated to governmental bodies:

The company has bid prices to the federal and state governments which were not identical with bids of competitors (Com. Exs. 125 A-B; 366 M-N; 1863; 1875 A; 2440) and has submitted f.o.b. mill prices to the federal and state governments when such bids have been requested (Tr. 47591-92; Com. Exs. 170 A; 366 M-N; 792; 1863; 1864; 1875 A; Resp. Exs. 56; 3006). Further evidence was rejected by the Examiner (Resp. Ex. 243 for id.).

The "control clause" was originated by the Signal Mountain Company, and Consolidated has continued to use the "control clause" since the Code, although most of its competitors have discontinued it (Tr. 47592-93; see also exceptions to Paragraphs 131, 132, *infra*). Further evidence was rejected by the Examiner (Resp. Ex. 3434 A for id.).

8. Exception is taken to the failure to report that Consolidated has used terms of sale which differed from those used by competitors (Resp. Exs. 986 A-B).

9. Exception is taken to the failure to refer to Resp. Ex. 1768 which accompanied Resp. Ex. 1769 (cited in Par. 17) and which explains the circumstances under which the latter was issued.

10. Exception is taken to the misleading inference contained in the reference to Com. Ex. 45 and the failure to refer to the following testimony and exhibits explaining and modifying it (Tr. 34401-04; 34499-501; 38780-82; Resp. Exs. 1971 A-C; 1972 A-B for id.).

11. Tr. 337-41 and 47536 cited in Paragraph 17 is inapplicable to the Consolidated company.

Paragraph 18

(Coplay)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Coplay Cement Manufacturing Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Coplay is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 18 that the policies and practices of Coplay have been adopted or carried on as the result of understanding or agreement with any other respondents. Exception is taken to the failure to report that the testimony of the president of Coplay shows that Coplay has not adopted or used any

of its policies and practices as the result of agreement or understanding with any of its competitors (Tr. 48098-100).

4. Exception is taken to the failure to report the following evidence with respect to the Coplay company generally:

Coplay is the oldest manufacturer of Portland cement in the United States, production at Coplay, Pa. having been begun about 1870. The company has one plant which consists of two units located at the site of its quarry. The plant is situated approximately one mile from Northampton, Pa. Coplay's principal office is at Coplay, Pa. and it maintains sales offices in New York, Philadelphia and Boston. It has never had any warehouses, silos or distributing points other than the storage silos at its plant (Tr. 6741-42; 48098-99).

The plant is a dry process plant with a capacity estimated in 1932 at 2,400,000 barrels annually based on actual operating experience. This capacity has been increased in the past due to improved operation of existing units (Tr. 6742; 48100). The plant's production has never been subject to any understanding or agreement with any competitor (Tr. 48100).

Coplay sells its cement normally in Massachusetts, Rhode Island, Connecticut, New Jersey and Delaware and in parts of Pennsylvania, New York and Maryland. In addition, it sells a small quantity in Washington, D. C. The company will on occasion sell cement as an accommodation to any friendly contractor customer who might secure a job outside of the territory outlined (Tr. 6742-43). As of July 1, 1937, Coplay was covering its sales area with twenty-two salesmen, the largest staff it has ever had (Tr. 48099).

None of Coplay's officers or directors have ever been officers or directors of any other cement company, and Coplay is not and never has been affiliated in any way with any other cement producing or selling company (Tr. 48098). Coplay has never traded any order with any other cement company (Tr. 48100).

5. Exception is taken to the failure to report the following evidence regarding Coplay's membership in the Institute:

Coplay joined the Institute on June 15, 1933 in order to participate in the emergency N.R.A. legislation. The Institute Code of Ethics, drafted in 1929, has been cancelled before Coplay became a member of the Institute (Resp. Exs. 2173 B-C; 2174 c; Tr. 16699; 16927-29). None of its officers, directors or employees has ever been an officer or trustee of the Institute or ever served on any of its committees (Tr. 6741; 48099-100).

6. Exception is taken to the failure to report the following evidence with regard to bids and bidding practices of Coplay.

The three bids cited in Paragraph 18 were all in response to invitations of federal governmental agencies for bids f.o.b. destination only and Coplay bid as requested (Com. Exs. 178 A-C; 372 B; Resp. Exs. 1713 A-N; 3182 C; Tr. 1576-77).

Coplay's bid on Com. Ex. 178 A, cited in Paragraph 18 occurred during the period when the N.R.A. Cement Code was in effect and the invitation to bid required compliance with the Code. The price bid by Coplay on this letting had been filed with the Code Authority by one of the bidders and transmitted by the Code Authority pursuant to the N.R.A. Code to the other potential bidders including Coplay. All bids were rejected as being too high even though the prices bid were 20¢ below the commercial market price. Coplay did not bid on any of the subsequent readvertisements (Com. Exs. 178 A-C; Resp. Exs. 193; 810-15; 1718).

Coplay's prices bid on Com. Exs. 303 D and 372 A (cited in Paragraph 18) were the current market prices at the destinations involved (Tr. 24042; 28044-45; Resp. Ex. 783; Tr. 28044).

All of the bids that Coplay has submitted to government agencies, state or federal, have been in response to invitations calling for f.o.b. destination prices only (Tr. 1576-77; Com. Exs. 14; 15 A-B; T; 178 A; 303 D; 314 i, w; 372 A-B; 378 E; 379 C; 380 C; 381 F; 382 D; 383 D; 384 D;

386-G; 387 A-J; 1699 A-D; M, R, W; 2772; Resp. Exs. 769 A-i; 784 A-C; 1713 A-N; 3182 C; 3688 A-N; 3689 A-i; 3690 A-J).

Coplay has never bid in any territory where land grant rates were involved and has never used any so-called "control clause" (Tr. 21071; 48099).

The evidence shows that Coplay has never had any understanding or agreement with any competitor with regard to prices on any public contract, state or federal (Tr. 48099).

7. Exception is taken to the failure to report the following evidence with respect to the pricing policies of the Coplay company:

Coplay's policy is and always has been to meet competitive prices where and as it finds them in the territory in which it does business. It learns of competitors' prices and changes in them from its salesmen and its dealers (Com. Exs. 250 A, B; Tr. 6750-51; 6761; 6772-75). Many of the prices Coplay meets reflect price bases at competitive mills. A great many, however, do not (Tr. 6752-63; 6763).

Coplay has found that its competitors quote secret prices that are less than their published prices and always meets such secret prices when it has been convinced to its own satisfaction that they exist (Tr. 6769-70).

The testimony of the President of Coplay shows that Coplay has never had any understanding or agreement with any competitor with regard to the establishment, maintenance or recognition of any mill as a base mill, the amount of any mill base or with regard to prices; and that the company has never had any agreement or understanding with any competitor to quote prices f.o.b. destination or in accordance with any particular method of pricing or marketing (Tr. 48099).

8. Exception is taken to the failure to report the following evidence regarding Coplay's dealer policies:

Coplay first published a printed statement of its dealer policy in February 1935. During the life of Article XI of the NRA Code, Coplay sold in accordance with its provisions. When that article was suspended Coplay followed

a flexible policy until Feb. 23, 1935. Shortly prior to that time some of Coplay's competitors had issued announcements of policy to the dealer trade describing the type of sales which they would make to dealers. Coplay found several of these in the hands of its dealer customers who were pleased with it and, to clarify its own policy for the benefit of customers, Coplay issued its own announcement, adopting the language of one of the competitive announcements. The evidence shows that this policy was not adopted pursuant to any agreement with competitors (Com. Ex. 1140; Tr. 6920-23; 7081-82; 48100-01).

Coplay's sales to dealers are made to those who in Coplay's opinion are dealers generally in building materials and have the warehousing facilities, equipment and service necessary to distribute cement to the consumer. In New England, Coplay sells cement to some who deal primarily in hardware, flour, feed or grain. In Pennsylvania, it sells to some who deal in coal. The company's policy with regard to whom it will sell as dealers has not changed at least since 1922. Since that date, Coplay's sales to its dealer customers have averaged about 80% of its total annual sales. Coplay sells and solicits over 800 active dealer accounts (Tr. 48100-01).

9. Exception is taken to the failure to report that Com. Exs. 3235-Z46, cited as evidence of Coplay's attendance at meetings, is the first page of minutes of a meeting of the Portland Cement Association on Sept. 14, 1909, and that there is no evidence that Coplay was represented at any kind of meeting thereafter other than duly constituted meetings of The Cement Institute.

Paragraph 19

(Cumberland)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote at page 9 of the Report that Cumberland Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or

practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote at page 9 of the Report that Cumberland is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the executive of Cumberland in charge of sales and operations, appeared as a witness on its behalf (Tr. 39809-922) and that his testimony covered a brief history of the Company and a full explanation of the development and use of its marketing policies, practices and pricing methods. This testimony was directed at the charges of the complaint as well as at evidence offered by Government counsel affecting the Company, including the subjects reported in Paragraph 19 (See below more specifically as to the foregoing).

4. Exception is taken to the failure to report the following evidence regarding the location and organization of Cumberland:

All necessary raw materials are available at the site of the plant (Tr. 39813). At the time the plant was projected, the volume of cement consumption was rapidly increasing and was taxing existing cement capacity (Tr. 39922). The Cumberland plant at Cowan, Tennessee, is completely encircled by mills of competing cement manufacturers at varying distances from Cowan of from 35 to 150 miles and the area in which Cumberland has a freight advantage over such competitors is so small as to be meaningless for practical purposes (see map, Resp. Ex. 3058; Tr. 39823-24; 39826-27; 39896; 39922). Because of the negligible size of its area of freight advantage and the sparsely settled mountainous country it covers (Resp. Ex. 3058) Cumberland seeks business considerable distances beyond and in so doing is confronted with competition from 16 other

cement producers (Resp. Ex. 3059). The area in which Cumberland sells is determined by consideration of the possibility of increasing volume at a satisfactory net (Tr. 39826-27; 39828). As soon as its sales are made at distances of 10 miles southeast of the mill, 25 miles west, 35 miles southwest and 50 miles north, it must absorb freight (distances approximate: see Map, Resp. Ex. 3058).

Cumberland has no arrangement with any other company regarding the area in which it solicits business (Tr. 39826-27).

5. Exception is taken to the failure to report the following evidence regarding Cumberland's membership in The Cement Institute:

None of the Cumberland's policies or practices have been formulated or influenced in any way by The Cement Institute (Tr. 39873).

The Company uses Institute freight rate books for invoicing, billing and shipping purposes (Tr. 39832). The availability of Institute freight rate books has represented a saving to Cumberland of between $3600 and $3800 per year. Prior to the time that Cumberland used the Institute rate books it compiled its own freight rate information and employed a Traffic Manager and two assistants for that purpose. Since the Institute rate books have been available, this Traffic Department has been abandoned and all freight and shipping matters are handled by a shipping clerk (Tr. 39829-31).

From the statistics furnished by the Institute, Cumberland compiles a tabulation comparing the relative position of other shippers in the district where it sells with its own in order to make sure its sales department is functioning as well as it should (Tr. 39871-72).

6. Exception is taken to the failure to report the following evidence regarding Cumberland's sealed bids and its pricing methods as follows:

When Cumberland began to market cement in 1926, it discovered that competitor companies were selling at delivered prices, and Cumberland followed the same practice (Tr. 39820-22). Since that time it has sold most but

not all its cement at delivered prices. Cumberland's customers without exception purchase cement on the basis of the laid-down cost at destination and, in order to compete with other sellers, Cumberland must meet competitive prices at destination (Tr. 39850-51). The evidence shows that Cumberland never had any agreement with any other respondent as to its prices or method of determining its prices, but it was required to and did observe its filed prices during the period of the NRA Code of Fair Competition (Tr. 39851; 39873-74).

Since the company began to operate, Cumberland has been a price follower, *i. e.*, it meets competitive prices as it finds them. It learns of competitors' prices at destination from dealers and other customers through its salesmen who are constantly traveling throughout the company's marketing area, and by reference to prices bid on public lettings (Tr. 39851-52). For ready reference the company keeps a card index of the lowest prices Cumberland finds quoted from time to time and refers to that record of prices until it is advised by its salesmen, or some intervening public letting, that there has been some change (Tr. 39852-53). In determining the price the company will quote at a given destination, it checks the last known price quoted at that point by any competitor. Cumberland has never known beforehand what prices competitors were going to quote on any business and has never had any agreement with any competitor regarding the prices the company would quote (Tr. 39873-74).

Prior to NRA there was comparatively little federal government business in Cumberland's marketing area. Invitations to bid requested destination prices or sometimes prices f.o.b. mill or destination in the alternative. During that period Cumberland submitted f.o.b. mill bids when requested. During the NRA, Cumberland bid prices which were on file with the Code Authority and in so doing began to use the so-called "Control Clause" which was filed with the Code Authority by one of the members of the industry as one of the terms and conditions of a bid to be made by it. The testimony shows that Cumberland never had any agreement with any competitor that it would adopt or use the "Control Clause", nor did it use it on any

occasion by reason of any understanding or agreement with any respondent (Tr. 39858-59).

From time to time Cumberland has found that competitors offer cement at prices lower than their openly-quoted prices. Cumberland has attempted to meet such prices and in so doing has sold cement at prices lower than the lowest prices offered by competitors (Tr. 39853).

7. Exception is taken to the failure to report the following evidence regarding Com. Ex. 180 (cited in Paragraph 19):

The delivered price of $2.55 quoted was the regular commercial price at which cement was selling at Monroe, La. (Resp. Ex. 859). The destination cost of $2.31 was based on a land grant rate furnished to individual bidders by the L. and N. Railroad (Resp. Ex. 897; Tr. 25336-37; 31894-95; Resp. Ex. 2284 A). Fractions of a cent in the destination cost bids were omitted because one of the bidders on a previous letting had obtained an award by so doing and competitors on this bid, anticipating a recurrence, did likewise (Resp. Ex. 896; Tr. 25333; Resp. Exs. 3046 B; 2284 A). Executives of several of the bidders on this letting appeared as witnesses and explained the circumstances surrounding their bids, how their prices were determined, and showed their independent action by contemporaneous documentary records (Resp. Exs. 859; 896-897; 2284; 3046; Tr. 25329-33; 31894-95).

8. Exception is taken to the failure to report the following evidence regarding Com. Ex. 401 (cited in Paragraph 19):

This is an abstract of the Oct. 1934 bids to T.V.A. These bids represented submission by the southeastern manufacturers to a formula price laid down as an ultimatum by Dr. Morgan, Chairman of T.V.A. (Tr. 2718-19; 31668; 2095-97; 2102-03; 38365; 38392-94). One of the prospective bidders filed this price with the Code Authority, without consultation or agreement with competitors, and the Code Authority notified the other likely bidders (Com. Ex. 925 6A-6D; Resp. Exs. 2206 A-Z26; 2918-21; Tr. 38366; 38374-402). The bids were not identical how-

ever (Tr. 31669-70) (see also Exceptions to Paragraphs 189-190, *infra*).

Dr. Morgan testified that the prices were fair to T.V.A. (Tr. 2143).

9. Exception is taken to the failure to report that Cumberland's price on Com. Ex. 1096 (cited in Paragraph 19) was the current market price at the destination involved (Resp. Exs. 915 A; 916 A; 902; 917; 946; 918; 919; 945; 906; 903).

10. Exception is taken to the failure to report that Com. Exs. 976-12N (cited in Par. 19) was incorrect as to date and was corrected by a contemporaneous documentary record (Resp. Ex. 3061; Tr. 39841-43).

11. Exception is further taken to the failure to report the following evidence regarding truck delivery of cement by Cumberland:

At one time a few nearby customers requested and were permitted to take delivery on their trucks. Although there never was any substantial demand for this, it did become sufficient to become an annoying problem to Cumberland in two respects, viz.: since the mill was not equipped for truckloading, it interfered with the company's regular railroad loading operations; and markets of good customers who took rail delivery were disrupted by those who trucked cement (Tr. 39840-41; 39843-45; 39889). Cumberland announced its discontinuance of trucking on August 10, 1932, effective August 15 without agreement or understanding with competitors. The matter was not discussed with competitors (Resp. Ex. 3061; Tr. 39845). In fact the Hermitage Company, nearest competitor of Cumberland, continued to make truck deliveries until February 1933 (Resp. Ex. 2661); and the evidence indicates that other competitors of Cumberland did not discontinue truck delivery at or about the same time it did (Tr. 39881; 38150-51). Even after August, 1932 Cumberland did not wholly discontinue delivery to trucks (Tr. 39842). At no time did Cumberland have a 15 cent or other differential for trucking (Tr. 39844).

12. Exception is taken to the failure to report the evidence showing that all the other practices and policies of Cumberland regarding the marketing of cement were adopted independently by Cumberland without understanding or agreement with other respondents (Tr. 39821-22; 39839-40; 39845; 39847; 39851-55; 39857-58; 39860-61; 39864; 39872-73).

Paragraph 20

(Dewey)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Dewey Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Dewey is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the wholly inadequate, unfair and misleading report in Paragraph 20 regarding the policies and practices of the Dewey Company at issue, and to the failure to report that the President and Vice-President of Dewey testified at length concerning the origin and use of its various practices and policies, and the evidence offered on its behalf showed that none of its practices and policies have been the result of any agreement or understanding with any respondent (Tr. 46666-67; 46681; 46897-98; 46902; 46900; 47094; 46733; 47090-91; 47101; 46775; 46840; 46920; 46692; 46637-38; 46703; 46778-80; 46709; 47119; 47047; 46949; 46938; 47066-67; 46876; 46878; 47145; 47151-52; 47023; 47035; 47147; 47150; 47058-59; 46988; 47000).

Exception is taken to the failure to report the following evidence regarding the organization, location and marketing area of the Dewey Company:

None of the directors or officers of Dewey are directors or officers of any other respondent and Dewey is not affiliated or connected with any other respondent (Tr. 47109; Com. Ex. 3150 C).

Construction of a cement plant at Dewey, Oklahoma, was begun by the company in 1906. Evidence showing the reasons why Dewey, Oklahoma was chosen and maintained as the site of a cement plant; the demand for cement at the time the plant was built and later enlarged; and the available raw materials in the company's quarry in 1936 was rejected by the Examiner (Tr. 46819-22).

As of July 1, 1937 Dewey found itself in competition with five independent cement plants, operating in the so-called Kansas Gas Belt and selling in Dewey's markets, as compared with twelve plants situated in the Kansas Gas Belt and with which Dewey competed in 1912; that during the period from 1912 to 1937 many competitor mills were dismantled or suspended operations and went out of business (for details see Tr. 46827); these mills were situated in the Kansas Gas Belt and had the same freight rates as the Dewey mill to all markets excepting a few nearby points of small consumption (Tr. 46829-30; 46965).

During the period from 1912 to 1925, Dewey made several increases in the capacity of its mill at Dewey, Oklahoma. The original capacity of 2,000 barrels per day was increased gradually, in accordance with the demand, to 4,500 barrels a day. There has been no increase in the capacity of the Dewey Oklahoma mill since 1925 (Tr. 46730-31; 46826-28; 14274).

Dewey's mill at Davenport, Iowa was built during 1926 and 1927 at a time of strong and increasing demand for cement in Iowa, Illinois, Wisconsin and Minnesota, the area the mill was intended to serve. In deciding to build a cement plant at Davenport, Iowa, Dewey considered numerous factors, among which were proximity to an area of large cement consumption, the available supply of raw materials, potential transportation facilities by water, loca-

tion on two large railroads, and the fact that the Interstate Commerce Commission had established freight rates on cement throughout the territory which would comprise the marketing area of the proposed mill, and the Dewey management knew what transportation costs it would have to contend with in meeting competition. Further evidence as to the reasons why Dewey selected Davenport as the site of a cement plant, was rejected by the Examiner (Tr. 46830; 46832-33; 46834-35).

Dewey's mill at Davenport had an original capacity of 3,000 barrels per day, which was increased to 4,800 barrels a day in order to meet the increased demand for cement. There has been no increase in its capacity since 1928. A survey made by Ford, Bacon & Davis in 1936 revealed that Dewey had an ample supply of raw materials at its Davenport plant for 500 years at the current rate of use (Tr. 46831; 46730-32; 14274).

5. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of the Dewey company:

Dewey has always found that the market for its product was at destination. Evidence, including contemporaneous documents showing the unanimous demand from customers for destination prices was rejected by the Examiner (Tr. 46778; 46793; Resp. Exs. 3646 A-F for id.; 3647 A-C for id.; 3609 A-D for id.).

Dewey has always attempted to meet the lowest prices quoted by any competitor at destination, whether or not those prices appeared to reflect any so-called mill base. Dewey meets any reduction in destination prices regardless of whether brought about by reduction in freight rates or some other reason. Dewey is concerned with the price at the market, rather than with fluctuations in freight rates (Tr. 47047; 47262-63; 14283-84; 12714; 47423; 47297).

The President and Vice-President of Dewey testified concerning Dewey's pricing policies and their evidence shows that Dewey never had any agreement or understanding with any competitor or with any respondent to sell its products at delivered prices or any agreement to quote prices that reflect the lowest combination of any mill base

plus freight, or to quote a price which is identical with any competitor's price (Tr. 46778-80; 47084; 47119; 47047).

Dewey supplies its salesmen with lists of destination prices for the territories they solicit; its practice has never been otherwise since 1912. The prices appearing on Dewey's lists of destination prices are merely the maximum prices which Dewey hopes to be able to get; they are subject to variation whenever it is necessary to reduce them in order to meet competition. Dewey has found that its competitors make "confidential" or secret prices to its customers and sell cement at prices below their respective published quotations and that this occurs continually. Dewey has frequently sold its cement to dealers as well as contractors at prices below its published prices ever since 1912 and still does. Dewey makes whatever price it thinks is necessary to meet competition and get the business. There is considerable higgling with Dewey's customers and finally Dewey either comes to the customers' terms or vice versa (Tr. 12694; 19627; 19624; 19626; 46729; 47149; 47203; 47212-19; 47205-08; Resp. Exs. 3621-22; 3645).

During the NRA Dewey filed prices with the Code Authority. The Vice-President of Dewey, who had been in charge of filing prices testified that he knew of no restriction on the prices that Dewey filed and that Dewey was free at all times to file any prices, terms or conditions of sale that it chose. At the outset Dewey filed with the Code Authority copies of its current price lists which it had on file and in the hands of its salesmen. The source of these prices was the information Dewey picked up in the field concerning the lowest quoted prices at the various points at which Dewey was doing business. The schedules filed were Dewey's current prices in effect at the time; these were the lowest prices Dewey found being quoted at the destinations listed, irrespective of whether they reflected any so-called base price plus freight. Typical samples of these price lists were produced and received in evidence. There was never any change in Dewey's practice in respect to prices it filed with the Code Authority (Tr. 46920-22; 46925-30; 46931-32; 46936-37; 47262; 47357; Resp. Exs. 3621 A-H; 3622 A-H).

Following the *Schechter* decision Dewey filed prices with The Cement Institute for about five months. During this period it was Dewey's understanding that there would be some legislation to replace NRA, the Institute would be the vehicle through which such legislation could be implemented, and by taking advantage of price filing facilities it could cooperate with the government. Dewey's management did not feel obligated to file prices after the *Schechter* decision; no effort was made by the Institute to control the prices that Dewey filed. Dewey never had any contact with any competitor in regard to any price it filed (Tr. 46938; 46949-50).

The Vice-President of Dewey testified that he and the President of the Company had a number of conferences as a result of which Dewey in 1933 issued price quotations which were related to a constant figure at its Oklahoma mill, the effect of which was to establish a base figure at its mill and reduce delivered prices in the area affected. Dewey had the idea that if it reduced its prices in the territory of its mill it might get more business, but it found, however, that it did not get any more business at the points for which these price quotations were issued than it had been getting prior to the time it made those reductions. Subsequently, when it became apparent that Dewey was not securing any additional business and that it was realizing less revenue on the sales it did make for delivery at those points, Dewey issued new prices which reflected a change in the previous policy. Dewey's Vice-President testified that he would know if Dewey had any agreement or understanding with competitors to recognize any mill as a base mill or to establish a mill base at either of Dewey's mills or to maintain any price level in any area around Dewey's mills or any other mills, and that it had not. No competitor established a price base at Dewey's plant to the knowledge of Dewey's executives (Tr. 47143-45; 46691; 47169-70; 47174).

The Vice-President of Dewey explained the action taken by Dewey in July 1932 and July 1933 in increasing its prices after increases had been announced by some of its competitors. To the extent permitted by the Examiner it

was shown that Dewey's action was taken independently and without contact or communication with any competitor either before or after it acted (Tr. 47146-48; 47199; Resp. Exs. 3648 A-L; 3649 A-D). Further proof to that effect, however, was rejected by the Examiner (Resp. Exs. 3648 i; 3654 A-J, for id.; Tr. 47127-28; 47131).

6. Exception is taken to the failure to report the following evidence regarding alleged "identical bidding" by the Dewey company:

All during the period of 1931-1933 Dewey quoted prices on public lettings, including lettings of the Illinois, Iowa and Oklahoma State Highway Commissions, which were lower than its then current published prices. Dewey, however, did not receive any larger percentage of the awards than it had received on public lettings theretofore when it quoted the same prices it was currently quoting to its regular customers at the destinations involved. It has been Dewey's experience, generally, on public lettings that it has not received any more business when it quoted prices less than its current market quotations to commercial customers. Dewey's sales to the federal government were generally made at prices considerably lower than Dewey's current delivered prices at the time. Documentary proof as to special prices bid by Dewey on public lettings was received in evidence (Tr. 47115-16; 46886; 47201-03; 47325-26; Resp. Exs. 3645 A-Z17; Com. Ex. 1884).

7. Exception is taken to the failure to report the following evidence regarding f.o.b. mill bidding and f.o.b. mill prices quoted by Dewey:

Where land grant rates are involved it has always been Dewey's policy to quote the government f.o.b. mill or f.o.b. destination according to whichever type of bid has been requested in the invitation. In June 1932 and again in April 1933 Dewey submitted f.o.b. mill bids to the federal government on requirements for use at Toledo, Iowa, which involved land grant rates. Dewey's bids were figured by its traffic manager upon the basis of land grant information issued by the U. S. War Department. On the bid submitted in June 1932, Dewey's traffic manager figured

the correct land grant rate applicable from Davenport and the price bid by Dewey proved to be the lowest of any submitted; however Dewey did not get the award because the government officer computed the land grant rate from Davenport to Toledo, erroneously, at a higher figure. Dewey took the matter up in writing and pointed out the error to the government. Subsequently, the government requested Dewey to bid a second time at Toledo, Iowa, which Dewey did, calling the government's attention to the fact that its prior bid had resulted in an award to a competitor because the government had not used the correct rates. Dewey again lost the award although its bid was the lowest submitted. Dewey, thereafter, continued to bid f.o.b. shipping point but included a "control clause" in its bids, which offered the government the right to apply the lowest commercial, special or land grant rate available. It was on the basis of its experience in bidding f.o.b. mill to the federal government in 1932 and 1933 that Dewey began to use the "control clause", which it had learned of through a notice received from the Code Authority of a filing which had been made by another company (Tr. 47009-10; 47019-20; 47018-19; 47003-04; 47014-15; 47012). Contemporaneous documentary evidence as to the circumstances under which Dewey adopted the method of bidding with a "control clause" was rejected by the Examiner (Resp. Ex. 8623 A-K for id.).

In using the "control clause" Dewey always took into account the lowest land grant rates available from its own mill as well as from all competing mills whether base mills or non-base mills. Dewey used the "control clause" only to the extent that it considered necessary to be competitive. Dewey never felt obligated to follow any particular practice in bidding to the federal government and had no contact with any competitor concerning the "control clause". Dewey never filed any land grant rates with The Cement Institute (Tr. 47022-25).

Dewey has always obtained information from the railroads concerning the land grant rates which is used; for example the information it used in estimating what it would realize on shipments made on the Fort Peck requirements.

Whenever Dewey needed land grant rates that it did not have in its files it asked the railroads for the rates from all cement producing points to the destination points in which it was interested at the time; Dewey secured such information by telephone and telegram as well as by letter. The railroads provided Dewey with tabulations of land grant rates which show rates from other mills as well as rates from Dewey's mills (Tr. 47020-22; 47026-28; Resp. Exs. 3624 A-B; 3625 A-B; 3626).

In bidding to the federal government when it used the "control clause" Dewey always considered that it was giving the government the full benefit of the land grant rate. Dewey's traffic manager, a qualified traffic expert, testified that there was no difference between Dewey's method of bidding to the federal government since the NRA and the method used prior thereto. Expert testimony as to whether the government was given the full benefit of the available land grant rates offered by respondents was rejected (Tr. 47033).

The evidence offered through responsible executives of the Dewey company shows: that Dewey has not refrained from selling f.o.b. mill and never had any agreement to do so; that Dewey has never had any understanding or agreement to quote destination prices or to quote the federal government prices related to any destination price or in accordance with any particular method; Dewey has made f.o.b. mill quotations to the federal government; on federal business Dewey has found that its market is at destination just as much as it is on commercial sales and in making its quotations to the government Dewey has attempted to meet the cost at destination; and that Dewey has never had any agreement with any competitor to quote the same price or to submit the same bid at any point (Tr. 46988-90; 47035; 47150).

Executives of the Dewey company who passed upon the proposal for bids shown by Com. Exs. 1339-40, testified that Dewey did not bid and that the reasons why it did not bid were developed in a conference of its executives, independently and without any contact with any competitor, as follows: The time for delivery, rate of shipment and place

of delivery were indefinite and the entire proposal was uncertain (Tr. 46993-94; 47000; 47397); it had been the policy of the Dewey company since the enactment of the Walsh-Healey Act not to bid on any invitation of the federal government which involved $10,000 worth of materials or more (Tr. 46995; 46999; 47398); it was provided that the government could take delivery at points beyond Dewey's market area and Dewey was apprehensive of the effect this might have on its ability to supply its regular customers (Tr. 46993-99).

Dewey also received other government invitations in evidence which were issued subsequent to the complaint in this proceeding, for bids on cement to be used in the State of Idaho. Dewey did not bid because that area is entirely out of its normal marketing territory and it did not consider that it could be competitive with mills located near the point of use (Tr. 47001).

8. Exception is taken to the failure to report the circumstances under which the Dewey company became a member of The Cement Institute, discontinued its membership and then rejoined at the time of the NRA Code, as follows:

Dewey joined The Cement Institute at the outset primarily because of its belief in the value of statistical information in the operation of its business (see further below Exception No. 9 this paragraph).

Dewey resigned from the Institute in 1931 at a time when its business was poor and it was doing everything possible to reduce expenses (Tr. 46760-67; 46769).

Dewey rejoined The Cement Institute at the time of the NRA because it understood that the Institute was to be the vehicle through which the government and the industry was to carry out the President's plan for increasing wages and improving conditions (Tr. 46775-76; 46765). Contemporaneous documentary evidence as to reasons why Dewey joined the Institute in 1933 was rejected by the Examiner (Resp. Ex. 3608 id.).

None of Dewey's representatives has ever been an officer or trustee of The Cement Institute. Responsible executives of Dewey testified that the Institute had never

formulated or interpreted any matter of policy for the Dewey company and that it was never understood that that was the function of the Institute (Tr. 46744-75).

9. Exception is taken to the failure to report the following evidence regarding the use of statistical information by the Dewey company:

Prior to becoming a member of the Institute, Dewey subscribed to the statistical service of W. S. Mallory. Dewey did not know who the other subscribers were. The W. S. Mallory statistics consisted of a forecast of probable demand in addition to figures on production, shipments and stocks on hand of cement. Dewey used Mallory's forecast to inform itself of the probable demand for cement in its territory. Dewey's traffic manager was at the time chairman of the cement section of the Trans-Missouri Kansas Regional Advisory Board, an organization of shippers of the principal commodities produced in the area, which was aided by state authorities, and which had been formed to assist the railroads in studying and forecasting car and equipment needs; he used Mallory's forecast in preparing quarterly reports to the Board on probable car requirements and found it of considerable value because it went into probable cement consumption in detail, and was issued earlier than the Bureau of Mines reports or other available information (Tr. 46751-52; 46764; 47271; Resp. Exs. 3603 A-C; 3604 A-D; 3605 A-D). In his reports to this Board on production, shipments and stocks on hand for the districts involved, Dewey's traffic manager obtained his figures from the Bureau of Mines reports. The Mallory figures on production, shipments and stocks on hand were not used (Tr. 46752-54; 46764).

Since 1908 Dewey has received requests every month for cement statistics from the United States Geological Survey and felt it desirable to make such reports because, in return, it received the reports issued by the Survey. Dewey has furnished statistics, as requested by the Bureau of Mines, continuously since 1908. On May 10, 1916, Edward N. Hurley, Chairman of the Federal Trade Commission, delivered an address to a meeting of the Portland Cement Association, which was attended by Dewey, out-

lining the benefits which would accrue from the reporting of statistics, from a uniform system of cost accounting and from standardization of product. Dewey was impressed and influenced by this and other speeches of the head of the F. T. C. with respect to the use of statistics (Tr. 46853; 46836-37). In July, 1916, Dewey received a pamphlet published by the Federal Trade Commission and, following its recommendations, in December, 1916, Dewey adopted a uniform system of cost accounting; Dewey took this action because the Federal Trade Commission stated that it would benefit the company and the industry as a whole. Since 1916 Dewey has made no change in its accounting methods and no change in its policy or method of reporting statistics. (Tr. 46844-45; 46847; 46878-79; 47452-53; 48065; 48078). Documentary evidence of the foregoing facts was rejected by the Examiner (Resp. Exs. 3658 for id.; 3678 for id.).

Dewey receives the Bureau of Mines' reports of monthly shipments into states and compares them with shipments for the previous year in order to get an idea of the trend of consumption and the probable demand and to check the effectiveness of its sales department. There is no difference between the use Dewey made of the Bureau of Mines statistics and the use it made of the Institute statistics. Generally, Dewey received the Institute's statistics earlier and, to that extent, they were helpful, because Dewey is anxious to learn as far in advance as possible what the probable demand will be, and where it will occur. Dewey has never concerned itself with statistics covering territory outside of its own market; it has never used any clinker statistics (Tr. 46839; 47136; 46841-42; 47279).

Dewey has never used the so-called Mallory figures (Com. Exs. 2917, 3205) or any other capacity figures in planning its operations. The testimony of Dewey's Vice President showed that Dewey has always determined its rate of operations by considering its own stock of finished cement on hand and the prospective future demand; it never used any figures in stocks of competitors' mills; it never had any set period of shutdown; it has tried to operate as continuously as possible in order to reduce pro-

duction costs; and never had any agreement or understanding regarding its production. Further evidence as to Dewey's policies in regard to production, and the use which Dewey makes of cement statistics, including documentary evidence was offered and rejected (Tr. 46733-35; 46748; 47139; 47269; Resp. Exs. 3602 for id.; 3653 for id.).

Dewey never operated on any quota or on any scheme of production at any time; and never used any formula in estimating its capacity. There has been no allocation of business in Dewey's territory, to the knowledge of Dewey's executives. Dewey has never had any agreement or arrangement with any competitor to trade orders or to allocate business (Tr. 46735-36; 46840-41; 46920).

10. Exception is taken to the failure to report the following evidence with regard to the use of freight rate compilations by the Dewey Company:

Dewey has always obtained its freight information direct from the tariffs. When rate changes occur Dewey checks from the tariffs direct to its own compilations which it keeps up to date at all times. Dewey has always maintained its own traffic department consisting of two traffic experts and several traffic clerks. In making up its compilations Dewey has to use over 67 different individual tariffs, some of which are consolidations of other tariffs. Dewey's compilations of freight rates show rates to all destinations in its trade territory from all producing points that Dewey has reason to believe it will be in competition with, regardless of whether they are so-called basing mills. Ever since 1912 Dewey has added new headline points to its freight rate compilations whenever a new mill came into operation and has dropped the headline point when a mill went out of business. Dewey never had any contacts with competitors in respect to selection of headline points (Tr. 46682-83; 46685-86; 46691; 14290-91).

In making up its freight rate compilations Dewey uses the lowest rate it can find from a producing point to a given destination, regardless of the route or the carload minimum. Dewey's traffic manager, a qualified traffic expert, testified that he has never found it necessary in his

experience to specify the route in order to get the benefit of the lowest available rate; that there are over 8600 available routes from Dewey's mill at Davenport, Iowa, to the destinations in its territory, and an even greater number of routes from the Dewey's mill at Dewey, Oklahoma, to destinations in its territory and it would not be practical to show these routings in any rate compilation; Dewey never concerns itself with routes from any mill other than its own. Dewey's traffic department makes reference infrequently to the tariffs for routing information. Dewey never found it necessary to include information in its freight rate compilations regarding carload minimums because in making up its compilations Dewey uses the lowest freight rate in the tariff regardless of the carload minimum weight and its practice has never been otherwise (Tr. 46691-94; 46730; 47134; 47255-56).

After joining The Cement Institute in 1930 Dewey received the freight rate books of the Institute and used them for occasional checking against its own compilations. Dewey found the Institute books substantially accurate. Dewey never used the Institute rates as an authority; in any case, where the checking revealed a difference, Dewey went to the official tariff to determine the correct rate and did nothing further about it; it did not call the attention of the Institute to any differences in the rate thus discovered. Dewey never considered the Institute rate service necessary in its business since it had its own traffic department which was organized to take care of its freight rate needs; after Dewey resigned from the Institute in 1931 it discontinued its subscription to the Institute freight rate books, and did not use them after that date (Tr. 46694; 46701-02; 47260-64; 12669; Resp. Ex. 3596 B). Dewey's traffic manager and Vice-President testified that Dewey has never had any understanding or agreement with competitors concerning the Institute's freight rate books or its own freight rate compilations; that Dewey never understood that it was expected, or required, to use any particular rate book in quoting prices. Dewey made no change in its method or manner of quoting prices after it joined the Institute (Tr. 46703; 47262).

Dewey uses, and has always used, a table for converting freight rates on cement from cents per cwt. to cents per barrel; this table was made up, individually, by Dewey's traffic manager in 1912, and has been revised by him to take care of percentage increases and decreases in freight rates, pursuant to orders of the I.C.C. and schedules issued by the carriers which contained rules for disposition of fractions. Dewey never used any conversion table other than its own; it never consulted or conferred with any competitor concerning the use of conversion tables or the handling of fraction in freight rates. Dewey has made no changes in its conversion tables or its method of disposition of fractions since it became a member of The Cement Institute (Tr. 46708-10; 46717-18; 46720; 47265-66; Resp. Exs. 3594 A-D; 3597 A-B; 3598 A-B; 3599 A-B; 3600; 3601).

The destination prices appearing in Dewey's conversion tables are the price quotations which Dewey gathers in the field; the freight rates appearing therein are taken from Dewey's freight compilations. Dewey has never furnished any compilations of freight rates to its salesmen. Dewey makes use of its freight rate compilations in the preparation of the shipping papers which it uses to make out bills of lading (Tr. 46730; 46728-29; 14293).

11. Exception is taken to the failure to report the following evidence regarding delivery to customers' trucks and the use of water deliveries by the Dewey company:

Dewey has never owned or operated any trucks for delivery of cement. Dewey has made sales to customers trucks at its Oklahoma plant continuously since 1912; and at its Davenport plant since it was built. Sales to trucks at the Dewey plants have always been made at the current destination prices and Dewey has always allowed the full amount of the rail freight from its plant to destination on all shipments sold for truck delivery (Tr. 46642-45; 47225; 47246).

The demand for trucking was very small; the majority of the trucking done from the Dewey, Oklahoma plant was handled by one large truck with two trailers; the remainder of the trucking consisted of a few nearby customers who purchased small quantities (Tr. 46646).

Dewey experienced difficulty in loading trucks due to the interference with car loadings. At its Oklahoma plant Dewey experienced considerable trouble in connection with the licensing of trucks; several customers from Arkansas and Kansas were arrested by the Oklahoma authorities and fined, which resulted in trouble to the Dewey company, as follows: The operation of trucks in the sales territory of the Dewey, Oklahoma plant was restricted and made difficult by Act of the Oklahoma Legislature, dated July 12, 1929, and by a further Act of the Oklahoma Legislature passed in 1933, which made more stringent the regulations governing trucking and had the effect of preventing the operation of any large trucks in that vicinity, including the only large truck which has been coming to Dewey, Oklahoma mill. Some of Dewey's customers were arrested by highway policemen and Dewey made many efforts to arrange with state officials for the continued operation of these trucks, but was unsuccessful. Contemporaneous documentary evidence of the action which Dewey took in order to protect and assist its customers who desired to truck cement was offered and rejected (Tr. 46655; 47232; Resp. Exs. 3586-88 for id.). After the Oklahoma law of 1933 went into effect customers stopped sending their trucks to Dewey, Oklahoma (Tr. 46656-59; 46661; 46647-51). Dewey never had any rules against trucking; and any of its customers could come to the Oklahoma mill at any time and buy cement at the destination price with full rail freight allowed (Tr. 46659; 47225; 47228; 47246).

When its Davenport, Iowa, plant began operations, Dewey delivered cement to trucks whenever customers desired it. After a few years the Government issued restrictions limiting the loads on the Government bridge across the Mississippi River, which prevented its use for large trucks; about the same time the City of Davenport passed an ordinance which restricted the operation of trucks in the city; these laws had the effect of cutting off the movement of cement by trucks into the principal markets to which trucking was being done.

Contemporaneous documentary evidence as to the laws restricting trucking from the Davenport, Iowa, plant during

the period 1927-1937 was offered and rejected (Resp. Exs. 3590; 3592; 3589 for id.; Tr. 46663).

The passage of the city ordinance about the middle of 1932 so limited the truck loads and the rate of speed that trucking from the Davenport plant was discouraged. Thereafter, a few trucks continued to come to the plant from destinations to the west, and were loaded at the mill at destination prices with full freight allowed. Dewey imposed no restrictions upon trucking from its Davenport mill (Tr. 46665; 46659-60; 47246).

In addition, Dewey received numerous complaints from its dealer customers of the Davenport plant concerning trucking of cement and typical samples of these complaints were introduced in evidence (Resp. Ex. 3591; Tr. 46665; 47229-30).

The Vice President of the Dewey company testified at length as to Dewey's policy in regard to sales of cement to trucks and testified that he would know if Dewey ever had any agreement with any competitor regarding trucking at any time and testified that it had not and that Dewey has never taken any cooperative measures in regard to trucking. Dewey never at any time charged 15 cents a barrel or any other extra charge for sales to trucks. Dewey still loads customers' trucks at both of its plants (Tr. 47232-33; 46666; 47243).

Dewey has never had any agreement or understanding at any time with any competitor concerning warehouses; its policy in respect to warehouses has never been influenced by competitors (Tr. 46897-98).

Water delivery has never been available to Dewey's plant at Dewey, Oklahoma. Shipments by water have been made from Dewey's plant at Davenport, Iowa, since 1929, whenever customers desired, irrespective of destination. On all of its shipments made by water Dewey quoted its current destination price and allowed the customer to deduct the full rail freight charges from its plant to destination (Tr. 46674; 47251-52; 46681; 46676; 46667-68).

Water transportation of cement has always been made fully available to its customers by Dewey. However, the shipments made by Dewey by water have amounted only to about 4% on the average, of its total annual shipments,

as shown in Resp. Ex. 3593. Most of the delivery points to which such shipments were made, including shipments made to contractors doing public work of various kinds, were not readily accessible by rail; barges can be operated only six months out of each year because of ice conditions on the river (Tr. 46675-76; 46681; 47438).

The Vice-President and traffic manager of the Dewey company, a qualified traffic expert, testified that he made an investigation prior to 1937 for the purpose of determining whether Dewey could effect any savings on shipment of cement by water transportation, and he found that the over-all cost of shipment by water was greater than the cost of shipment by rail (Tr. 46673; 47437-39). Dewey never had any agreement with any competitor regarding the method of shipment used in the transportation of its cement (Tr. 46681).

12. Exception is taken to the failure to report the following evidence regarding the policies of the Dewey company with respect to dealers and sales direct:

Dewey's policy in respect to the qualifications of a dealer has remained unchanged since 1912. In selecting its dealers Dewey has never concerned itself with the question whether the dealer was a member of any association or whether other manufacturers sold to him. Neither The Cement Institute nor any competitor has ever had anything to do with Dewey's policy in respect to the dealers it sells (Tr. 46898-900; 46902).

Dewey has never followed any plan or classification of business. Dewey has sold cement direct to contractors, concrete pipe manufacturers, tile manufacturers, railroads, and to federal and state governments since 1912. Dewey has found that its contractor customers, generally, require the service of a dealer in order to get small deliveries as desired and to handle sack returns, carry accounts, and render other services. As of 1912 there were not many large contractors in the territory served by Dewey and it was not until after that date that the development of paving programs began. Since 1912 there has been an increase in the types of customers to which Dewey has made direct sales.

In connection with the services which Dewey renders to concrete product manufacturers, ready-mix plants, etc., Dewey at least attempts to meet what its competitors are doing and, if possible, to do a little more. Dewey has gone just as far as it could to get business; there have been instances where Dewey has rendered services of value but lost the business because a competitor rendered services of greater value. Further evidence as to the various services which Dewey has rendered to contractors and to other classes of buyers, the extent thereof, and the difference in value between such services and the services rendered by competitors, was offered and rejected by the Examiner (Tr. 47075-77; 47105-06; 47377).

During the period of the NRA Code Dewey followed the same sales policies it had theretofore. Early in September, 1933, many of Dewey's customers individually communicated with the company before they had seen the proposed code and complained of the alleged elimination of the dealer; these customers wanted to know what Dewey's policy was going to be in regard to Article XI, and the President of Dewey replied in a general letter as follows:

> "I regret exceedingly I only have one copy of the Tentative Cement Code or I would gladly send you a copy, although it is the sixth that has been filed with the Government . . .
>
> "The code is wholly a Government document, and although over 98 per cent of the cement capacity of the United States has earnestly and vigorously endeavored to have their code acceptable to the Government, it is only in the last few days it has been set for formal public hearing in Washington September 15th where all can be heard.
>
> "I wish to sincerely assure you I am of the opinion the Committee representing the cement producers have made no effort whatsoever to deprive the cement dealers of fair treatment.
>
> "A copy of the cement code can be obtained by you by addressing N.R.A., Room 3316, Department of Commerce Building, Washington, D. C.
>
> "Again let me say I am sorry you are alarmed, as I am firm in my belief the Government will finally adopt a code giving all concerned fair treatment."

Dewey had no communications or conferences with competitors in regard to Article XI and no understanding or agreement concerning the so-called classification of business to be included therein (Tr. 47092-94; 47371-72; Resp. Exs. 3643 A-P).

In February, 1935, Dewey learned, through reports which its salesmen picked up in the field and numerous letters from its dealers, of the distribution of printed sales policies by the Lehigh company and the Universal-Atlas company. Dewey did not follow those policies because Dewey's dealers seemed satisfied with its own sales policy and it saw no reason to change it; Dewey did not discuss these policies with any competitor (Tr. 47084-86; 47444-45; Resp. Exs. 3641 A-H).

Dewey has found that work of the character of WPA work generally falls within confines of some city or town where Dewey has a dealer customer; it has always been Dewey's policy to sell work of such character to the dealer because it generally requires deliveries in small quantities on the job, and Dewey has never made any change in that policy. (Tr. 46941; 46992; 47101-02; 47444-45).

Subsequently, in April 1935, Dewey found that new sales policies of competitors were in the hands of the trade and a number of Dewey's dealers, individually, called these policies to Dewey's attention and wanted a statement of Dewey's policy. On May 6, 1935, Dewey, as a means of advising all of its customers what its policy was, issued an announcement which reaffirmed Dewey's policy of quoting through the dealer all work of the character of the emergency relief agency projects, regardless of location, and attempted to cover everything that competitors were offering to do. Dewey had no communications with any of its competitors in regard to its sales policy. Dewey's Vice-President testified that he would have known if Dewey had any agreement or understanding with competitors concerning sales policies and that it had not (Tr. 47086-88; 47090-91; 47370-71; 47444-45; Com. Ex. 2386). In practice the Dewey company has varied from the terms of its policy, as announced in May 1935, wherever it has found it necessary in order to meet competition. Dewey has never con-

sulted or communicated with any of its competitors in regard to the application of its policy and the management has always felt free to exercise its own judgment (Tr. 47100-01).

13. Exception is taken to the failure to report the following evidence regarding the terms of sale, discounts and other miscellaneous sales practices of the Dewey company:

Dewey never adopted the so-called Lehigh selling plan because it was Dewey's conviction that it did not offer its dealers as much as Dewey was offering them under its own policy which had been in effect prior thereto. Its action was wholly independent, and none of Dewey's executives had any conferences, negotiations or communications with dealers or with competitors concerning the Lehigh plan or concerning any of Dewey's terms of sale and discount (Tr. 47065-67; 46641; Resp. Ex. 3640).

Dewey never made any use of the Compendium. It has always been free to do as it pleased in regard to the practices described in the Compendium. Dewey felt that many of its existing practices were more favorable to the dealers than those in the Compendium and it never made any attempt to change its practices to conform to the Compendium (Tr. 47067-68; 47424). All of Dewey's contract and sales forms have been drafted by its traffic manager prior to 1928 without consideration of any forms issued by any competitor (Tr. 47151-52; 47043-44; Resp. Exs. 3627 A-D).

Dewey's quotation forms contain a clause relating to routing shipments which was drafted by Dewey's traffic manager in 1912, without contact with any competitor and used by Dewey without change ever since. This clause was drafted prior to the time Dewey experienced any difficulty with diversions and has nothing to do with Dewey's policy in regard to diversions of shipments in transit (Tr. 47132-34; 47195).

Since prior to 1928 Dewey's forms have contained a clause reading: "Seller will absorb freight charges paid upon empty sacks returned." The origin and development of this clause was shown by the evidence as follows: When Dewey began to operate, the Western Freight Classifica-

tion provided that cement sacks must be returned freight prepaid, and returns could be made to some cement mills at the full fourth class rate and to other mills at one-half of the fourth class rate. About 1921 Dewey discovered that some of its competitors having plants in Kansas were permitting customers to return cloth bags, freight charges prepaid, and were reimbursing the customers for one-half of the freight charges. When Dewey discovered this change of practice, it met the situation by remitting one-half of the cost to such customers as had to pay the full fourth class rate on returns to Dewey, Oklahoma. A few months thereafter Dewey found that a competitor, the Western States Portland Cement Company, had notified the trade that it would absorb all of the freight charges on sack returns and Dewey immediately met this competition. Subsequent to adopting this policy, the freight absorbed by Dewey annually on sacks returned amounted to over $20,000 (Tr. 46854-57; 46688; 47316-18).

Dewey has absorbed freight charges on all sacks returned by its customer ever since its announcement of January 30, 1922, in which it advised the trade that it would meet the competition of the Western States Portland Cement Company. Subsequently, and prior to 1928, the Railroad Freight Classification Rule was changed by the I.C.C. so as to permit cement sacks to be returned, freight charges collect, and since that time Dewey has always permitted its customers to return cloth sacks, freight collect. There has been no change in Dewey's practice regarding sack returns since the formation of the Institute (Tr. 46866-67; 46854-57; 46860; Resp. Exs. 3619-A-B).

Dewey notifies its customers of price changes by means of quotations. Where Dewey learns of a competitor's announcement of a price change and decides to follow it, Dewey makes its prices effective at the time it discovers the competitor's quotation regardless of the effective date thereof. This has been Dewey's practice without change ever since 1912.

Dewey's quotation forms contain Dewey's famous "Five Day Clause" which guarantees that if the price of cement is advanced Dewey will accept for shipment within

15 days at the former price all orders for stock requirements received within 5 days from the date of the advance. No limitation is set on the amount of cement that can be ordered. This policy was originated by Dewey and publicly announced to its trade in 1915. Dewey adopted the policy to improve its standing with the dealers. Subsequently Dewey found that some of its competitors adopted a similar practice. Dewey protects the customer in the event of a decline in price by giving the benefit of the new lower price on all orders for stock requirements unshipped, even though the customer has ordered at a higher price. This has been Dewey's policy since 1914 and was adopted for the same reason that Dewey introduced its policy of protecting dealers at the old price in case of a price advance (Tr. 47036-42; 47060; 47045-46; Resp. Exs. 3628; 3631; 3633 A-B; 3627 A; 3649 A-D).

On contracts for cement for future delivery for specific work Dewey guarantees the customer against a decline in price during the life of the contract and has always done so since 1912 (Tr. 47037; 47039; 47045-46; Resp. Exs. 3727 A-D; 3629).

In practice Dewey has frequently made deviations from its "Five Day Clause" in the case of price advance as well as in case of price declines; the period is flexible since the prime consideration to Dewey is to satisfy the customer in order to continue to do business with him (Tr. 19624; 19626; 47053-54; 47048; Resp. Exs. 3634 A-E; 3635 A-G; 3640 G-i; 3640-Z4-5).

Dewey's policy relating to price changes was adopted without contact with competitors; the Vice-President of Dewey testified that the officials of the company, including himself, had conferred on and discussed these policies prior to the time they were adopted by Dewey and that none of its officers had any agreement or understanding with competitors in regard to these policies (Tr. 47058-59). [See also Exception No. 11 to Par. 93.]

Dewey has always guaranteed delivery of its cement. It has always been Dewey's practice since 1912 to handle customer's claims for credit for freight overcharges, as well as for shortages or damage in transit. Dewey's in-

voices and other forms have always contained a provision giving notice to its customers of its policy concerning shipments in transit. By virtue of I.C.C. decisions claims relating to overcharges, shortages, or damage in transit require the presentation of the paid freight bills. In order to comply with these provisions special forms pertaining to such claims were drafted by Dewey's traffic manager and furnished to its customers prior to 1920 and have been used without change ever since. Documentary proof of the origin of Dewey's policy and typical transactions showing Dewey's practice was received in evidence (Tr. 46808-13; 46815-17; 46789-90; 47305-06; 46794; Resp. Exs. 3610 A-C; 3611 A-F; 3617; Com. Ex. 2677).

One of the clauses in Dewey's quotation forms and invoices, which were drafted by Dewey's traffic manager prior to 1920, pertains to loss or breakage of paper sacks in transit. This clause applied only to shipments in paper sacks its intention and purpose was to induce customers to use greater care in handling cement in paper bags and thus to discourage claims for shortage. In practice Dewey never held the customer responsible and never adhered to the terms of that clause (Tr. 46818; 47299-301; 47303-05).

Dewey's terms and conditions of sale are stated in its quotations invoices and other forms, as follows:

> "Freight charges shall be paid by the buyer for the account of the seller and the original paid freight bills shall be sent to seller promptly for proper credit."

This clause was drafted by Dewey's traffic manager prior to 1928 and has been used without change in Dewey's forms ever since.

Dewey has always permitted the customer to pay the freight charges for Dewey's account and to return the paid freight bill for credit. It has always been Dewey's practice, in billing customers, to include with its invoices a separate slip advising the customer of the correct amount of freight charges which he should pay. This practice was originated by Dewey's traffic manager about 1916. It has always been Dewey's practice to charge the customer with the gross value of the cement and the sacks and to credit

the customer's account with any freight charges that he may pay on shipments and any cloth sacks he may return for credit. Unless the customer sent in the freight bill, his account remained open in the amount of the freight. It has been Dewey's routine practice to follow up the customer, if he remits without sending in freight bills, and urge him to send them in for credit; on rare occasions the customer does not return the bill and Dewey writes to the railroad agent at destination and requests a copy which will show whether the customer paid the freight; this is done because Dewey is responsible for the freight charges (Tr. 46783; 46788-89; 47297-98; 47136; 47119; 47134-35; Com. Ex. 2677).

14. Exception is taken to the failure to report the following evidence concerning the policy of the Dewey Company regarding diversions of cement in transit:

It has always been Dewey's policy to oppose diversions of its shipments in transit. Dewey adopted this policy because of the complaints which were made, individually, to Dewey by its dealers because of the invasion of their trade territory by other dealers which were not located in that market. The Vice-President and traffic manager of Dewey, who has been in the management for over 25 years, testified at length concerning Dewey's policies and showed that Dewey had never taken any cooperative measures to prevent diversions of its cement in transit. On May 23, 1935 Dewey learned from the Missouri Pacific Railroad Company of the practice of stamping bills of lading in order to protect the shipper against reconsignment in transit without its consent. Subsequent Dewey began to use a stamp on its bills of lading. Dewey has never received any communication from The Cement Institute or from any competitor regarding the stamping of bills of lading and it has never had any communication with any competitor regarding the matter (Tr. 46635-37; 47442-43; Resp. Exs. 3585 A-B).

15. Exception is taken to the failure to report the following evidence regarding the manufacture of standard and special cements by the Dewey company:

It has been Dewey's policy to manufacture cement to special specifications whenever requested by any of its customers. Dewey has manufactured High Early Strength cement since 1930. Dewey has manufactured special cements for government purposes. Dewey has found that the manufacture of special specifications costs more than the manufacture of its normal cement because of interruption of operating schedules, tying up of additional storage facilities and the addition of special materials. The need for special bins to provide for special cements has compelled Dewey to increase its storage capacity, many bins being tied up with small quantities of cement. Dewey has never done anything to hinder, discourage or eliminate special specifications (Tr. 46870; 46885-86; 47319).

Dewey has always attempted to manufacture its cement of a quality at least as good as the cement of competitors. Dewey maintains a testing laboratory where it continually analyzes and tests the cements of its competitors; whenever it discovers a competitor's cement which exceeds the quality of its own, Dewey takes immediate steps to meet that quality (Tr. 46874-75; 47320).

Executives of the Dewey company testified that Dewey has never been able to obtain a premium in price for its cement over any other brand, irrespective of any transitory differences in quality and that the Dewey organization has not found any instance where a competitor received a premium in price over Dewey's product (Tr. 46882-83).

Dewey has never made any efforts to discourage competitors from advertising on a quality basis. Neither the P.C.A. nor the A.S.T.M. nor any competitor has done anything to influence Dewey regarding specifications or quality, except that competitors, by improving the quality of their products, have compelled Dewey to improve the quality of its product. Evidence as to the changes which Dewey made in its plants as a result of quality competition and as to the expenditure of $2,750,000 by Dewey for new equipment, machinery and processes during the period from 1928 to 1937, in order to meet the quality requirements was rejected by the Examiner (Tr. 46876-77; 46833; 46886-89).

16. Exception is taken to the failure to report the following evidence regarding Dewey's membership in the Portland Cement Association:

In January 1931 Dewey resigned from the P.C.A. because several contributors had stopped paying dues; the P.C.A. services fell off because many of the field men had been withdrawn from territories in which Dewey operated and Dewey felt that it was bearing an undue portion of the expense of supporting the P.C.A.'s activities and it wanted to reduce expenses. When it appeared that competitors were again supporting the promotional work of the P.C.A., Dewey rejoined. At this time business conditions were better and that was one of the reasons why Dewey rejoined. Dewey had no agreement with any competitor in regards to rejoining the P.C.A. or in regards to prices (Tr. 46770-73; 47272-74; 14316).

Paragraph 21

(*Diamond*)

1. Exception is taken to the implication suggested in Paragraph 82 and the footnote to page 9, that The Diamond Portland Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Diamond is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the implication in Paragraph 21 that the acts or practices of Diamond were carried on pursuant to understanding or agreement with any other

respondent on the ground that such implication is not supported by the evidence. Exception is further taken to the failure to report the testimony of the President of Diamond, showing that the company has had no such agreement or understanding (Tr. 47754-60).

4. Exception is taken to the reference to Com. Ex. 1965 in Paragraph 21 because the record shows Diamond was not represented at the meeting in question (Resp. Ex. 3265).

5. Exception is taken to the failure to report the following evidence regarding Diamond generally and its determination of prices:

Diamond is a small company, with a 1,000,000 barrel mill located at Middle Branch, Ohio (Tr. 47756). It markets cement in Ohio, western Pennsylvania and northern West Virginia (Tr. 47756-57). The company has been in operation since before 1910 (Resp. Ex. 3264; Tr. 35877).

The company arrives at its price for any destination point simply by ascertaining the prevailing price at that point and meeting it (Com. Ex. 3139). On one occasion, Diamond attempted to initiate price increases but these were not followed by the company's competitors and it was unable to sell any cement at the higher prices. It has been the company's experience that when it follows price increases, it continues for a considerable period of time to ship a substantial volume at its old low prices (Resp. Exs. 3551; 3556; 3557; Tr. 37785). The evidence shows that Diamond has had no agreement to meet prices or to use any particular system or method of pricing or marketing, or to quote any particular prices (Tr. 47758).

Diamond does not exchange price information with competitors (Tr. 47758).

6. Exception is taken to the failure to report that there is no evidence that any bid of Diamond's was identical with the bids of competitors.

7. Exception is taken to the failure to report the following evidence regarding Diamond's sales to dealers: The major part of Diamond's output is sold through dealers

(Tr. 47757). The qualifications which the company requires of its dealers vary according to the locality of the dealer. They may or may not be required to carry a general line of building materials as well as cement (Tr. 47757).

8. Exception is taken to the failure to report that Diamond's salesmen do not carry or have Cement Institute freight rate books (Tr. 47757) and that the evidence shows that the Institute has never attempted to direct or exert any influence over Diamond's prices or policies (Tr. 47759).

9. Exception is taken to the failure to report that Diamond trucks a large percentage of its shipments into certain markets. (Resp. Exs. 3551; 3557).

Com. Ex. 1362 R, cited in Paragraph 21 has no relation to Diamond.

Paragraph 22

(*Edison*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote at page 9 of the Report that Edison Cement Corporation is identified or connected with any alleged activities of The Cement Institute or any alleged policies and practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See Exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote at page 9 of the Report that Edison is identified or connected with "group" activities or "industry" policies or practices. There is no evidence to support the statement and none is cited. In fact the evidence cited shows that the policies and practices of Edison have been adopted independently without agreement, understanding or collusion with any competitor.

3. Exception is taken to the failure to report that the vice-president in charge of sales of Edison appeared as a

witness on its behalf and testified fully regarding the practices and policies of the company. This testimony was directed to the charges in the complaint as well as evidence offered by Commission's counsel affecting Edison and included all subjects referred to in Paragraph 22 of the Report (Tr. 35586-862, see more specifically below).

4: Exception is further taken to the assertion that Edison Cement Corporation was the "successor" to Edison Portland Cement Company and to the failure to report the following evidence regarding the formation of the respondent Edison:

Edison Portland Cement Company was organized shortly after 1900 and began the operation of a cement mill at New Village, New Jersey, in 1904 or 1905. The entire stock of Edison Portland Cement Company was owned by Thomas A. Edison, Inc., and the Edison family. For several years immediately preceding 1931 the Edison Portland Cement Company was losing money and it decided that all of its debts and liabilities should be cleared up by the Edison family and Thomas A. Edison, Inc., after which a new company would be formed. The respondent Edison was organized January 1, 1931 and the assets of Edison Portland Cement Company, which had been dissolved, were transferred to the new corporation. Edison Cement Corporation is not affiliated with any other cement company nor are any of its officers or directors (Tr. 35588-92).

5. Exception is taken to the failure to report the following evidence regarding the location and operation of the Edison plant:

The annual capacity of the Edison mill is about 2,000,000 barrels and there have been periods when the Company has operated all of its ten kilns at the same time. Edison has shipped as much as 2,280,673 barrels of cement in a given year (Com. Ex. 3114 B), but during the past ten years the capacity of the Company has been reduced through a slow-up in production induced by many changes in cement specifications (Tr. 35593-95).

The Edison plant is located in what is commonly referred to as the Lehigh Valley area. Consequently, there

are only about a dozen towns, all very small, to which Edison has a freight advantage over any competitor (Tr. 35629-30; Resp. Ex. 2543). The area in which Edison normally solicits business and ships cement has shrunk during the past 15 or 20 years. The company has been obliged to withdraw from several markets because of decreasing prices which Edison could not afford to meet (Tr. 35604-07; 35633-36; Resp. Ex. 2544). In recent years over 65 per cent of Edison's shipments have gone into an area where Edison's freight rates are substantially the same as the freight rates from competitive plants (Tr. 35630-31; Resp. Ex. 2543; Tr. 35615-17).

6. Exception is taken to the failure to report the following evidence regarding Edison's membership in The Cement Institute:

The Code of Ethics of The Cement Institute and the Compendium were never used in any way by Edison nor did the company ever conform any of its practices or policies to either of these instruments (Tr. 35800-02). Edison has used the rate books published by The Cement Institute in the same way that it used rate books published by earlier traffic services. Edison has had no understanding with competitors regarding the use of the Institute rate books (Tr. 35802-04). Edison has never had any arrangement with competitors either to curtail production or allocate or share business. Its production program for each year is based on information furnished from the Sales Department, together with a minimum quota which it sets for itself at the beginning of each year. This quota is determined for considering shipments for the previous year and the prospects of business during the coming year, as gathered from the various statistical services to which the company subscribers, *i. e.*, the F. W. Dodge Corporation Service, the Dow Service, Engineering News Record, and others. Contemporaneous company records covering the years 1931 through 1937 show its vigorous efforts to increase its sales and production each year (See Resp. Exs. 2587-2602; 2542.)

7. Exception is taken to the failure to report the following evidence regarding the pricing practices of Edison:

Edison is essentially a price follower: it ascertains through its salesmen and customers the lowest quoted prices of competitors and attempts to meet those prices (Tr. 35636; 35639). Edison's only attempt at price leadership was the initiation of a 25 cent per barrel price increase which was not followed by competitors (Tr. 35636-39; Resp. Ex. 2545). Edison's customers, dealers, contractors and the federal government alike purchase cement on the basis of an f.o.b. destination price and Edison has, generally speaking, sold its cement at delivered prices. There have been occasions, however, when Edison has made f.o.b. mill sales and quotations (Tr. 35639-40; 35646; Resp. Ex. 2605; Tr. 35788; 35795). Edison's use of delivered prices is not the result of any understanding or agreement with competitors (Tr. 35798; 35805-06).

8. Exception is further taken to the failure to report in connection with Com. Ex. 3114 [cited in the Report with respect to "pricing"] that the statement contained therein was prepared by the assistant secretary of the company who had died prior to the institution of this proceeding (Tr. 35650), and for the further failure to report that the vice president in charge of sales of the company, who had charge of its sales policies testified in full with respect to the methods pursued by Edison in the determination of its prices, in brief, as follows:

Edison ascertains the lowest prices quoted by competitors in the field. Frequently changes in prices are traceable to an arithmetical relationship to some constant base figure at some mill. Having checked a number of destination prices, Edison is able to satisfy itself that a constant base has been used by the competitor initiating the change, and in such cases Edison will act accordingly (Tr. 35643-44). All of Edison's prices, however, do not relate back to some base figure. There has never been a time in the past fifteen years when all Edison's prices related to some base. In acting on the assumption that changes in prices reflect a base throughout a given area, Edison has sometimes been mistaken and subsequently discovered that its assumption was incorrect (Tr. 35644; Resp. Ex. 2553; Tr. 35661-63).

Edison compiles and keeps a current record of the prices it finds at all the destinations in its sales area, and this record is used to quote prices at those destinations (Tr. 35657-58; Resp. Exs. for id. 2546-52). Edison has had no understanding or agreement with competitors regarding the use of basing points, selling at delivered prices, or with respect to its method of pricing (Tr. 35805-06).

9. Exception is taken to the failure to report the following evidence regarding bidding by Edison:

On invitations from the federal government, states and other public bodies, Edison quotes its published commercial prices at the destinations involved. The evidence shows that none of the bids of Edison have been submitted pursuant to any understanding or agreemnt with competitors (Tr. 35799-800).

Edison has never had occasion to quote in territories where land grant rates are available to the federal government and has never quoted with the use of any so-called "control clause." The first invitation from the federal government received by Edison which called for f.o.b. mill bids (Com. Ex. 1339) was received in March, 1938. Many of the features of this proposal were entirely different from any that the company had previously encountered and several of them were at variance with the company's established sales practice. After full and serious consideration of all of its provisions, Edison decided to and did submit an f.o.b. mill bid which it determined by averaging the mill nets it had realized on all of its New Jersey business since January, 1938. Although it was the low bidder within the zone to which its bid, under the terms of the proposal, was applicable, Edison received no award (Tr. 35784-92; 35795; 35798; Resp. Exs. 2605-07). Evidence of the failure of the Government to make an award and as to Edison's efforts to ascertain the reasons why it received no award was rejected by the Trial Examiner (Tr. 35794; 35795-96; Resp. Ex. 2608 for id.).

Subsequently, in May of 1938, the Edison company received a second and similar invitation from the same agency of the Federal government for f.o.b. mill bids. However, having bid on the prior invitation in exact ac-

cordance with its terms and having received no award even though it had been low bidder, Edison concluded that the Federal government was not interested in receiving bids f.o.b. mill and therefore decided to submit no bid in response to the second proposal. In reaching this decision, the company did not have any discussion, communication or arrangement with any competitor (Tr. 35796-97).

10. Exception is taken to the failure to report that Edison's prices on Com. Exs. 9 and 303 D (cited in Paragraph 22) were the current commercial prices at the destinations involved (Resp. Ex. 796; Tr. 35799).

11. Exception is taken to the citation in Paragraph 22 of Com. Ex. 1089 as an "identical bid" since Edison was not a bidder on this letting.

12. Exception is taken to the failure to report regarding Edison's dealer policies that the entire history of Edison's methods of sale respecting dealers and other customers was testified to by the company's vice-president in charge of sales (Tr. 35705-24; 35732-43; 35753-67; 35838-39; 35841-44) and traced, to the extent permitted by the Examiner, by a series of contemporaneous company records (Resp. Exs. 2564-68). Further contemporaneous documentary records to complete the evidence showing the development and use of Edison's dealer policies were rejected by the Trial Examiner (Resp. Exs. 2569-83 for id.). Exception is further taken to the failure to report this evidence, which in summary was as follows:

Prior to 1931 Edison's destination prices included a 10 per cent per barrel dealer trade discount and a 10 per cent per barrel discount for cash in fifteen days. When the Lehigh Company initiated its dealer payment plan in November, 1930, Edison learned of it through the trade, considered it a good one, and adopted it. This dealer payment plan received an unfavorable response from dealer customers generally and Edison, like other companies faced with this response, withdrew the policy (Tr. 35765-08; Resp. Exs. 2564; 679). Edison clarified its dealer policy in February, 1931 with a general announcement to the trade (Resp. Ex. 679). Subsequently, Edison

reviewed its dealer policy and incorporated it in a sales code as of January, 1932, which was distributed to its sales organization but not to competitors or customers (Resp. Ex. 2568; Tr. 35714; 35722-24). This policy was followed by the company until the time of the NRA Code with such variations as were necessary to meet competitive conditions (Tr. 35711-12).

While Article XI of the NRA Cement Code was in effect, Edison subscribed to it. There had been a tendency toward more direct sales between 1932 and the time of the Code, and Article XI represented very little difference from the practices which Edison had been following prior to the Code period. During the period immediately following the suspension of Article XI, Edison continued to follow the policy outlined in that Article, but there was an increased clamor from the trade for a greater percentage of business to be sold through dealers (Tr. 35741-43). Further evidence proving this was rejected by the Examiner (Tr. 35753-54; Resp. Exs. 2569-77 A-B for id.).

The Edison announcement of policy dated February 21, 1935 (Resp. Ex. 2568), referred to in Paragraph 22 of the Report was issued in response to the wishes of dealer customers after such a policy had been announced by a competitor (Tr. 35755-56). The Edison announcement of policy dated April 9, 1935 (Resp. Ex. 2585), referred to in Paragraph 22 of the Report was a modification of the February policy again fashioned in response to customer demand and a similar policy previously issued by a competitor (Tr. 35756-57; 35761-64). Additional evidence bearing on this was rejected by the Examiner (Tr. 35757-59; Resp. Exs. 2579-83 for id.; 2584-85). Edison's dealers accepted Edison's April policy as a fair method of distributing cement (Tr. 35764). Edison had no agreement or understanding with competitors regarding the issuance or adoption of either its February or April, 1935 policy (Tr. 35764).

13. Exception is taken to the failure to report the following evidence regarding truck delivery of cement by Edison:

Edison discontinued the delivery of cement to buyers' trucks at the mill in the summer of 1932, after having received information from its customers and salesmen that

other companies in the area had announced the discontinuance of trucking at their plants (Tr. 35677; Resp. Exs. 2555; 2556). Delivery to trucks was a source of considerable difficulty at the Edison plant because the arrangement of packing and loading facilities was intended for rail delivery; access for trucks was impractical and dangerous (Tr. 35683-84). In addition truck delivery was also strenuously objected to by many of Edison's more important customers (Tr. 35689). Documentary records showing the attitude of these customers were rejected by the Examiner (Tr. 35692; Resp. Exs. 2558-61 for id.). When others abandoned trucking, therefore, Edison was glad to do likewise (Tr. 35677). Edison did not discontinue trucking as the result of any agreement or understanding with competitors (Tr. 35683; 35833). Since 1932 truck delivery of cement by competitors has caused Edison to withdraw from certain of its markets because it was unable to meet the competition (Tr. 35695-97; Resp. Exs. 2562-63 for id.).

During the period that Edison did make delivery to customers' trucks, the demand for such delivery was never substantial (Resp. Ex. 2554) and Edison has had no call for delivery to customers' trucks since the time that Edison discontinued it (Tr. 35836-37).

14. Exception is taken to the failure to report the following evidence regarding Edison's effort to compete with imported cement.

Edison comes into competition with imported cement in the metropolitan districts of New York, Boston, and Philadelphia, and at various times in the past, adopted certain practices, none of which it initiated, in an effort to meet this foreign competition (Tr. 35757).

Several years ago, the company discovered that one of its competitors had adopted a policy of declining to sell cement to dealers who were handling foreign cement. At that time, Edison was feeling the competition of foreign cement particularly and was losing considerable business to it in the areas already referred to. The company's executives thought that a policy similar to that adopted by the competition in question might in some measure help the

sitifation so far as Edison was concerned. Edison, therefore, decided to and did adopt a similar one.

In applying its policy, Edison learned which of its dealers were handling imported cement from the routine reports of its salesmen which had always carried and still carry information as to the brands of cement being handled by the various dealers they solicit. The company has always kept records for each of its dealer customers which show the monthly shipments to the customer over a period of years together with any information concerning the customer that may have been reported in by salesmen. In carrying out its policy regarding dealers handling foreign cement, Edison merely noted on the particular dealers' card information reported by its salesmen regarding any foreign brands handled (Tr. 35768-69).

During the short period of time that Edison had its policy in effect, it found that some of its dealers handled foreign cement continuously and that others handled it for a while, dropped it and then handled it again. Edison varied the application of its policy to the variations in the policies of its dealers (Tr. 35769). Edison discontinued its policy about five years ago when it discovered that some manufacturers were continuing to sell cement to dealers handling foreign cement (Tr. 35770).

Edison has never exchanged lists of dealers handling foreign cement with any competitor and never had any understanding or agreement with any competitor regarding its policy toward those dealers (Tr. 35769-70).

In 1935, Edison learned that some of its competitors had established stocks of cement in Brooklyn in close proximity to points of entry for foreign cement and were selling to dealers' trucks at prices 25c or 30c less than those Edison was quoting. Edison met this competition by establishing stocks of its own in the vicinity. It was the company's hope that by so doing it could regain some of the business it had lost to foreign cement and as a result it did regain some of the lost business but only at prices that were ridiculously low. Edison discontinued its Brooklyn stocks after six months because it found that some dealers were coming in from points 50 miles distant, taking cement and selling it at low prices in the markets of other of its dealer

customers with resultant disruption of Edison's relations with the latter (Tr. 35770-72). None of Edison's actions with regard to Brooklyn stocks were the result of cooperation with competitors (Tr. 35771).

Paragraph 23

(Federal)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Federal Portland Cement Company, Inc. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Federal is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication that any of the acts and practices of Federal have been adopted or carried on pursuant to agreement or understanding with any other respondent, and to the failure to report that the Executive Vice President and the Sales Manager of Federal appeared as witnesses and testified fully regarding the development and use of the practices and policies of the company, including the subjects reported in Paragraph 23 (Tr. 30447-864; 30399-436); and this testimony showed that Federal's policies and practices were developed and used independently without understanding or agreement with any respondent (See more particularly, below).

4. Exception is taken to the statement that "Prior to 1933 Bessemer sold its output" because the respondent

Bessemer was not in the cement business until July 1, 1935 (See exceptions to Paragraph 12, *supra*).

5. Exception is taken to the statement that "It was involved in identical bidding" because it is not supported by the evidence and the citations given are invoices on sales to dealers, and not bids (Com. Ex. 2683).

6. Exception is taken to the erroneous statement that Federal joined the Institute December 8, 1933. Com. Ex. 617 shows that it joined January 11, 1934.

7. Exception is taken to the failure to report the following evidence as to the company generally:

Federal is a small company with one mill of 1,250,000 barrels capacity located at Buffalo. A larger cement company has a mill at Buffalo and another has a silo. Federal is not affiliated with any other cement company (Tr. 30483; 30490; 30484). Evidence concerning the reasons for locating the mill in Buffalo was excluded by the Examiner (Tr. 30478-79).

Evidence showing that the mill is an efficient and modern unit was also rejected by the Examiner (Tr. 30482).

Federal markets cement in New York and in the northwestern and northcentral parts of Pennsylvania (Tr. 30503-06; 30419-20). Most of its shipments go to points within 85 miles of its mill (Tr. 30508-09).

Federal was reorganized about 1931 (Tr. 30415-17; 30429-30). On or about November 27, 1933, it began to market its own cement (Resp. Ex. 2061; Tr. 30459).

Federal is in active competition with Bessemer (Tr. 30419-20).

The testimony shows that Federal has not been a party to any agreement to restrict production (Tr. 30484).

8. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of Federal.

Federal usually sells at delivered prices because that is where it finds competition (Tr. 30524). It has no requests for f.o.b. mill prices from commercial customers or

state highway departments (Tr. 30524; 30534-36). Buyers invariably request delivered prices (Tr. 30525).

Federal determines its prices by "finding out what the price is at destination" and meeting "that price" (Tr. 30547).

The evidence shows that Federal has had no agreement or understanding regarding its prices and that it obtains its information regarding competitors' prices and market practices from its customers and not from competitors (Tr. 30579; 30591-92; 30593; 30547; 30550-51; 30557-58; 30588; 30660; Resp. Exs. 2084; 2085; 2116); that it does not send, receive, or exchange price or price base information (Tr. 30585; 30588); and never has any assurance that its prices will be as low as the lowest price of any competitor (Tr. 30579).

Federal keeps a file of its delivered prices and uses this file for current quotations (Resp. Ex. 2086). It has found that when it quotes lower prices, competitors always lower theirs accordingly and meet them (Tr. 30588-89).

Federal handles all claims for loss or damage in transit (Resp. Exs. 2087 B; 2088 B; 2089 B; Tr. 30713). Its invoices provide that the buyer pays the freight for Federal's account (Resp. Exs. 2088 B; 2089 B).

9. Exception is taken to the failure to report the following evidence regarding Federal bids:

Federal quotes government agencies the same prices it quotes its dealers (Tr. 30594). It does not sell in territory where there are land grant rates and has never used a "control clause" (Tr. 30625).

Federal has not consulted with competitors about any of its bids (Tr. 30804-08).

10. Exception is taken to the failure to report the following evidence regarding truck delivery by Federal:

Federal has trucked ever since it started to sell cement (Tr. 30656). It ships 90% of the cement close to its Buffalo mill by truck (Tr. 30491) and 50% of all its shipments are by truck (Resp. Ex. 2112). Dealers sometimes come to the plant with their trucks and pick up cement but there have only been a few requests made to Federal for delivery.

to customers' trucks at the mill (Tr. 30523; 30628-29; 30635-36). Dealers have requested Federal to discontinue trucking (Tr. 30643; 30653) but Federal refused (Tr. 30656).

Although Federal finds it more expensive to load and service trucks (Tr. 30642) it never has had a 15¢ charge for loading trucks (Tr. 30631).

The evidence shows that Federal has not had any agreement to discontinue trucking nor any discussions with competitors, dealers, or railroads on this subject (Tr. 30631; 30656-57).

11. Exception is taken to the failure to report the following evidence regarding the practices and policies of Federal respecting direct and dealer sales:

Federal has not announced any policy regarding its direct and dealer sales since April 1935. Its April 1935 policy and a prior one in February of that year were announced in response to its dealers' requests for an expression of its policy after Article XI of the NRA Cement Code was suspended. Both policies were framed by Federal to follow announcements of a competitor in order that the company would be in as good a competitive position with the trade as that competitor (Tr. 30695; 30850-52; 30814-17).

Prior to NRA Federal's policy had been substantially similar to that stated in Article XI. Federal, by inertia, continued its policy after the suspension of Article XI and until February and April of 1935, when its restated policies met substantial concessions to dealers offered in competitors' announcements (Tr. 30814-16; 30686-87; 30695; 30697-98). Since 1935 Federal has not strictly adhered to its April policy, but has varied its practice with varying competitive conditions (Tr. 30819-20).

The company's dealer and direct sales policies and practices have not been subject to any agreement or understanding with any competitor; nor has Federal discussed them at meetings (Tr. 30687; 30691; 30701-02; 30765; 30852; 30686-87; 30695; 30850-52).

Federal's concept of a dealer depends upon the town the dealer is located in and the surrounding circumstances (Tr. 30672). Its competitors sell to persons it doesn't con-

sider to be a dealer (Tr. 30673) and Federal sells to some dealers which are not sold as such by competitors (Tr. 30673-74).

The evidence shows that Federal has not had any agreement with any respondent concerning who was a dealer (Tr. 30672-74). Federal never received lists of dealers from dealer associations (Tr. 30678). In making sales to dealers Federal does not consider whether a person is a member in a dealer association and it does not pay attention to dealer association's protests (Tr. 30678-79; 30680; 30683; 30672-75).

12. Exception is taken to the failure to report the following evidence regarding Federal's membership in The Cement Institute:

Federal joined the Institute in December 1933, because of the NRA Cement Code (Tr. 30714). The Institute has not been regarded by Federal as a formulator of industry policy, and it has never fixed or dictated any policies of Federal (Tr. 30715).

The Institute statistical service and freight rate books are of value to Federal (Tr. 30735-36; 30760).

The company uses the Institute rate books for applicable rates needed in the operation of its business, including shipping (Tr. 30761). The Institute books are not necessary to enable Federal to meet competition (Tr. 30764). The evidence shows that Federal has had no agreement to use the Institute rate books, right or wrong; and that the company always uses the published tariff rate in case of any discrepancy revealed by checking the Institute books against the tariffs (Tr. 30760-61).

13. Exception is taken to the failure to report that Federal does not compete with foreign cement (Tr. 30762).

14. Exception is taken to the failure to report the testimony showing that Federal has never had any agreement to prevent diversions of cement in transit (Tr. 30627).

Paragraph 24

(Florida)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Florida Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is furthe taken to the assertion in Paragraph 82 and the footnote to page 9 that Florida is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 24 or elsewhere in the Report that the practices and policies of Florida have been adopted or carried on as a result of understanding or agreement with any other respondent on the ground that there is no evidence to support it. Exception is further taken to the failure to report that responsible executives of Florida appeared as witnesses and showed that Florida has had no such agreement or understanding (Tr. 47569, *et seq.*; 13321, *et seq.*).

4. Exception is taken to the failure to report that Florida sells cement only within the State of Florida and for the export trade to the West Indies and Central America. Accordingly the company comes into domestic competition only in the limited number of respondents who do business in Florida (Tr. 47582).

Evidence showing that in recent years Florida has made renewals and improvements in its mills other than repairs was rejected by the Examiner (Tr. 47581).

5. Exception is taken to the failure to report that Florida rejoined the Institute in June, 1933 in order to

participate in the emergency NRA legislation (Tr. 13371-72).

6. Exception is taken to the inadequate and misleading reference to the pricing methods of Florida and to the failure to report the evidence relating thereto including the following:

Florida's policy is to offer its cement delivered on terms and conditions that are either as favorable or more favorable than other cements at the same place and at the same time. Many of the prices quoted by Florida are determined by adding the applicable freight rate to a base at its own mill, but when such prices are higher than prices quoted by any competitor, Florida then must and does meet the lower prices. Information regarding competitors' prices is obtained from the field. The company's salesmen are furnished with lists of the company's prices at all destinations where they sell (Tr. 47586-87; 47614-16). The company has not always adhered to its published commercial prices (Tr. 47611-14; 47588; 47590-91).

In attempting to meet competitive prices at destinations Florida never has any assurance that its own price will be as low as the lowest quoted by any competitor. It can only tell by the subsequent daily checking of its sales force and advice from customers (Tr. 47617-18). The company sells in areas where prices do not reflect any base figure. Moreover, the patterns of prices which do appear in parts of its sales area vary from time to time (Tr. 47615).

7. Exception is taken to the failure to report the following evidence regarding Florida's bids to government agencies: Florida has bid f.o.b. mill to the federal and state governments and has bid prices on government lettings which were not identical with prices of competitors (Tr. 47591-92; Com. Ex. 314 W).

The "control clause" was originated by the Signal Mountain Company, and Florida has continued to use the "control clause" since the NRA Code, although most of its competitors have discontinued it (Tr. 47592-93). See also exceptions to Paragraphs 130-138, *infra*). Further evi-

dence was rejected by the Examiner (Resp. Exs. 3434 id.; 3170 A-B ;or id.; 2830-34 id.).

8. Exception is taken to the failure to report the following evidence regarding Florida's bid in Com. Ex. 1098 (cited in Paragraph 24): The switching rate applicable for Pensacola Naval Air Station delivery was supplied to all bidders by the Navy Department invitation (Resp. Ex. 817; Tr. 25038). The delivered price quoted by Florida was its commercial price at Pensacola plus the switching charge furnished by the Navy (Com. Ex. 1098; Resp. Ex. 819; Tr. 25043-44).

9. Exception is further taken to the failure to report regarding Florida's bid in Com. Ex. 1099 R (cited in Paragraph 24) that its price was the then commercial price at destination (Com. Exs. 1099 R-S; Resp. Exs. 819; 2909 N).

10. Exception is further taken to the failure to report that Florida's bid on Com. Ex. 1099 W (cited in Paragraph 24) was the then commercial price at destination—a special port price 36 cents lower than the former price at that destination had been (Resp. Exs. 779; 819; 2909 N; Tr. 39679-80).

11. Exception is taken to the failure to report regarding truck delivery that in the fall of 1935 Florida established a warehouse for delivery to customers' trucks in Miami (Tr. 26883-84).

12. Exception is taken to the failure to report that Florida did not issue a statement of policy regarding the kind of work it would sell direct and to dealers until December, 1937 and that it sold direct to W.P.A. until that time (Tr. 1864-68; 4896; Com. Exs. 331 A-B).

Paragraph 25

(Georgia)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote at page 9 of the Report that Georgia Cement and Products Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited.

2. Exception is taken to the assertion in Paragraph 82 and the footnote at page 9 of the Report that Georgia is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is further taken to the failure to report that the citations regarding Georgia in Paragraph 25 represent the only evidence in the case offered by the Government regarding Georgia; that this related only to three subjects at issue (identical bidding, trucking and membership in the Institute); and to the further failure to report the evidence showing that the policies and practices of Georgia have been used independently and without agreement, understanding or collusion (See citations below).

4. Exception is further taken to the failure to report regarding Georgia that in order to save time and at the express invitation of the Trial Examiner (Tr. 38463; 38631-32; 39018; 48101) Georgia adopted as its own, evidence adduced in behalf of other respondents, in lieu of calling a witness. The testimony adopted by Georgia was directed at the charges in the complaint, including the subjects reported on in Paragraph 25 and expressly met and denied any implication of understanding, agreement or collusion on the part of Georgia (Tr. 48101-02).

5. Exception is further taken to the failure to report the following evidence regarding Georgia's membership in The Cement Institute:

The Institute has never attempted to influence Georgia in the matter of its prices nor has it participated or acted in any way to affect the competitive policies or practices of Georgia (Tr. 48101-02; 26136-37; 26208; 26441-42; 37607-08).

Georgia has never had any understanding or agreement regarding its use or non-use of the Institute freight rate books (Tr. 48101-02; 37315; 37316; 38709; 38710); nor regarding its production or as to the amount of business it would obtain (Tr. 48101-02; 38691; 40098).

6. Exception is taken to the failure to report the following evidence regarding the pricing practices of Georgia:

Georgia learns of cement prices of its competitors from three sources: information picked up in the field by its salesmen in the regular course of their calling on the trade; from customers by telephone calls or letters; and from bids of competitors to government agencies tabulated by its salesmen who attend the lettings, and frequently reported and published by news service companies. In most markets information regarding changes in competitive prices or policies is obtained almost as soon as the competitive announcements are in the hands of the consuming trade. In all cases, the lapse of time is very short, and never more than a day (Tr. 48101-02; 38742-44).

The evidence shows that Georgia has been wholly free to quote any prices it pleases and has had no understanding or agreement with competitors as to the prices (Tr. 48101-02; 37605-06; 26196; 37605-06; 38703; 26196).

7. Exception is further taken to the failure to report the following evidence regarding Georgia's bids to public bodies:

Invitations to bid in the area where Georgia sells, largely call for destination prices. Where land-grant rates have been available Georgia has obtained the rates from local railroads and used them, independently, in determining its price to the government (Tr. 48101-02; 42335-36). During NRA a so-called "control clause" was filed by one of the bidders and Georgia in meeting terms and conditions of this filed price, used the same clause, finding it a

convenient way to give the government the benefit of land grant rates and an f.o.b. mill price (Tr. 48101-02; 42402-03). The company has had no agreement regarding whether or not it would quote f.o.b. mill prices to the government (Tr. 48101-02; 37606; 38733).

8. Exception is further taken to the failure to report the following evidence regarding Com. Ex. 180, cited as an identical bid in Paragraph 25:

The delivered price of $2.55 quoted was the current market price for cement at Monroe, La. (Resp. Ex. 859). The destination cost of $2.31 was based on a land grant rate furnished to individual bidders by the L. and N. Railroad (Resp. Ex. 897; Tr. 25336-37; 31894-95; Resp. Ex. 2284 A). Fractions of a cent in the destination cost bids were omitted because one of the bidders on a previous letting had obtained an award by so doing and the competitors on this bid, anticipating a recurrence, did likewise (Resp. Ex. 896; Tr. 25333; Resp. Exs. 3046 B; 2284 A). The independent action of bidders on this letting was shown by the testimony and by contemporaneous documentary records (Resp. Exs. 859; 896-97; 2284; 3046; Tr. 25329-33; 31894-95).

9. Exception is further taken to the failure to report the following evidence regarding Com. Ex. 401, cited as an identical bid in Paragraph 25:

This is an abstract of the October 1934 bids to TVA. These bids constituted submission by the southeastern manufacturers to the formula price laid down as an ultimatum by Dr. Morgan, chairman of TVA (Tr. 2718-19; 31668; 2095-97; 38379; 2102-03; 38365; 38393). One of the prospective bidders filed this price with the Code Authority, without consultation or agreement with competitors, and the Code Authority notified the other likely bidders (Com. Exs. 925-6 A-D; Tr. 38374-402). The bids were not identical, however (Tr. 31669-70).

Dr. Morgan testified that the prices were fair to TVA (Tr. 2143).

10. Exception is taken to the failure to report the following evidence regarding Com. Exs. 1083 and 1096 A, cited as identical bids in Paragraph 25:

Georgia's prices were the current commercial prices at the destinations involved in these lettings (Resp. Exs. 930-38; 921-29; 902-03; 906; 915-19; 945; 946). Land grant rates available to the government were furnished by the railroads (Tr. 31820; 31828; 31831).

11. Exception is further taken to the failure to report the evidence showing that Georgia has no agreement or understanding to forbid the delivery of cement to customers' trucks or to charge any differential therefor (Tr. 48101-02; 37606-07).

12. Exception is further taken to the failure to report the following evidence regarding the other policies and practices of Georgia:

It shows that the company has no arrangement or agreement with respect to its selection of dealers and that The Cement Institute has never had anything to do with this question (Tr. 48101-02; 37217; 26208); and that Georgia has not had any understanding or agreement regarding the sales it makes direct or through dealers (Tr. 48101-02; 37607).

The evidence shows further that, except in so far as its terms and conditions of sale may have been influenced by changes induced through NRA, Georgia has had no understanding or agreement regarding its terms (Tr. 48101-02; 39509; 37607); and no understanding or agreement to prevent the diversion of its cement in transit (Tr. 48101-02; 39706-07; 38720; 26442).

Paragraph 26

(Giant)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Giant Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully reported in

the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Giant is "identified" or connected with "group activities" or "industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is further taken to the failure to report that in order to save time and at the express invitation of the Trial Examiner (Tr. 38463; 38632; 39018) Giant adopted as its own, evidence adduced in behalf of other respondents, in lieu of calling a witness. The testimony adopted by Giant was directed at the charges in the complaint, including the subjects reported on in Paragraph 26, and expressly met and denied any implication of understanding, agreement or collusion on the part of Giant (Tr. 48103-04; 37606).

4. Exception is taken to the failure to report the evidence showing the following with respect to Giant's pricing practices and policies:

Giant obtains information concerning the prices of its competitors from its salesmen, its customers, from tabulations of bids submitted to government agencies obtained by its salesmen who attended the lettings, and from reports of bids published by news service companies. Giant's dealers and contractors are well informed as to the current delivered prices of all companies. They compare all prices quoted to them and will only buy at the lowest price quoted in any given market (Tr. 48103-04; 38742-44).

Giant does not receive from or furnish to competitors any information regarding prices. It has not been guided or influenced by the views of anybody outside of its management with respect to the company's prices or price policies. Neither The Cement Institute nor any competitor has ever been consulted in determining Giant's price policies (Tr. 48103-04; 26136-37).

Giant has never had an agreement with any competitor to quote identical prices with such competitor, nor has it

had any agreement that the prices quoted would reflect some combination of a base plus freight. It has not had any understanding or agreement whereby it would maintain a particular price level in the area around its mill (Tr. 48103-04; 37605-06).

5. Exception is taken to the failure to report the following evidence regarding "identical bidding" referred to in Paragraph 26 of the Report:

Giant's prices on the letting referred to in Com. Ex. 9 A were its current commercial prices at the destinations involved (Tr. 24159; 34165-66; 28044-45). The letting referred to in Com. Ex. 1099 M occurred during open price filing under the NRA Code and the prices bid by Giant had been filed with the NRA Code Authority (Com. Exs. 490 L-N, O-R).

Further exception is taken to the failure to report that Giant has never quoted the federal government in any territory where land grant freight rates were available (Tr. 48103-04; 26174) and that the evidence shows that Giant had no agreement with any competitor as to how it would respond to the invitation for bids in Com. Ex. 1339 (Tr. 48103-04; 38733).

6. Exception is taken to the failure to report the evidence showing the following regarding Giant's membership in The Cement Institute:

Giant has never had any understanding or agreement with a competitor that it would adhere to some code of ethics or code of practices. It did not subscribe to any Code of Ethics of The Cement Institute (Tr. 48103-04; 37607-08).

Giant has never had any understanding that it would use the Institute freight rate books in quoting prices (Tr. 48103-04; 37315-16; 38709); nor has it had any understanding or agreement with any competitor with reference to the use of freight rate books (Tr. 48103-04; 37316), as to the manner in which rates should be converted into cents per barrel (Tr. 48103-04; 38710).

7. Exception is taken to the failure to report the evidence showing the following regarding Giant's dealer policies and practices:

Giant has never had any understanding or agreement with any of its competitors to limit its sales to those who came within a so-called definition of a dealer, nor does it have any understanding with any dealer group or association to limit its sales in that manner. In many instances it has sold cement to dealers who are not treated as dealers by other manufacturers. In considering a new dealer account Giant does not give any consideration to the fact that the dealer prospect is a member of any association of dealers (Tr. 48103-04; 37215-16). The Cement Institute has never taken any position as to whom Giant should sell cement as dealers (Tr. 48103-04; 26028; 37217).

Giant has never had any understanding or agreement with a competitor as to the kinds of work for which it would sell cement direct and the kinds of work for which it would sell cement to dealers (Tr. 48103-04; 37607).

Giant has never had any agreement or understanding with a competitor to adhere to any particular terms or conditions of sale or discount (Tr. 48103-04; 37607).

Since the expiration of the NRA Code, Giant has not made any substantial changes in its contract forms. This has not been due to any arrangement or agreement with any of its competitors (Tr. 48103-04; 39509-10). Giant has never agreed to exchange specific job contracts with its competitors or to cancel such contracts (Tr. 48103-04; 40096-97; 37243).

8. Exception is taken to the failure to report any of the evidence relating to Giant's policy and practices with regard to imported cement competition. The evidence shows the following:

Giant has never been party to any agreement or understanding with competitors to refrain from selling cement to dealers who handled imported cement (Tr. 48103-04; 26206) and has never had any agreement or understanding with a competitor concerning the prices which it would quote in the so-called "port areas" (Tr. 48103-04; 26196).

9. Exception is taken to the failure to report any of the evidence introduced on behalf of Giant regarding deliveries to customers' trucks and diversions of cement in transit.

which shows that Giant has never had any understanding or agreement to forbid delivery of cement to customers' trucks or to impose some extra charge for loading customers' trucks (Tr. 48103-04; 37606-07) and that Giant has never entered into any agreement with its competitors to prevent diversions of cement in transit or to stamp its bills of lading in order to prevent such diversions (Tr. 48103-04; 38720).

10. Exception is taken to the failure to report that Com. Ex. 3005 A, cited in Paragraph 26, refers to a duly constituted meeting of the Portland Cement Association; and to the further failure to report that the only activity of the Portland Cement Association so far as Giant is concerned has been to promote the use of cement through technical services for the benefit of users of cement, to make and publish technical studies of the composition and properties of cement, and consider and act on operating problems of cement mills, particularly those concerned with promotion of accident prevention methods (Tr. 48103-04; 33985-86).

Paragraph 27

(*Glens Falls*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote at page 9 that Glens Falls Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. Exception is further taken to the assertion in Paragraph 82 and the footnote at page 9 that Glens Falls is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the foregoing and none is cited. Exception is further taken to the failure to report the evidence referred to below, showing that the policies and practices of Glens Falls have been used independently and without agreement, understanding or collusion.

2. Exception is taken to the failure to report in Paragraph 27 that the President of the Glens Falls Company, who has been in charge of determining its policies and practices, appeared as a witness on its behalf and testified fully concerning the operations of the Company (Tr. 47880-959).

3. Exception is taken to the failure to report the following evidence regarding the organization and location of Glens Falls:

None of the officers or directors of Glens Falls are officers or directors of any other cement company, nor is the Glens Falls Company affiliated in any way with any other cement manufacturing company (Tr. 47882).

The Trial Examiner rejected evidence showing that although the company was organized and the plant built in 1893, it had been the practice of the company to keep the mill modernized; and that over a million dollars had been spent in recent years in a program of modernization and improvement so that the mill is a highly efficient unit (Tr. 47884).

There are a number of competing cement mills located to the east, south and west of the Glens Falls mill and the area in which Glens Falls has a freight advantage over these competitors is very small and sparsely settled. The rates from the Glens Falls plant are higher than those of competitors to the first point in any direction from Glens Falls where there is any appreciable cement demand (Tr. 47891-93). Accordingly, in order to sell cement in markets of any consequence, Glens Falls must absorb freight in meeting competitive prices (Tr. 47889, 47935-36).

The company's marketing area has diminished considerably over the years and even within the past three years Glens Falls has been forced to withdraw from comparatively nearby New York state markets because of lower prices and better service offered by competitors (Tr. 47889; 47936-37). The Trial Examiner rejected other evidence to this effect (Tr. 47887).

In marketing its cement, Glens Falls comes into competition with approximately 25 competitor companies (Tr. 47890).

The evidence shows that Glens Falls has never had any understanding, arrangement or agreement with any other cement company regarding the area in which it would solicit business, nor with respect to allocating or sharing business with any other company (Tr. 47890).

4. Exception is taken to the failure to report the following evidence regarding Glens Falls' membership in The Cement Institute:

The marketing policies and price policies of the Company have not been affected in any way by the company's membership in The Cement Institute (Tr. 47913-14).

Glens Falls has used the Institute rate books but has never had any understanding or agreement with competitors with respect to their use (Tr. 47912-13).

5. Exception is further taken to the failure to report the following evidence regarding the pricing methods and bids of Glens Falls:

In order to sell its cement, Glens Falls must meet the lowest prices it finds at destination (Tr. 47930; 47891). Glens Falls finds the lowest prices of competitors at each destination from its salesmen and customers, and it meets those prices, acting on the latest information it has on hand (Tr. 47890-91; 47931-32). This is the company's only source of information regarding competitors' prices (Tr. 47894; 47900). The company has encountered and made prices below the published quoted prices at destination. Such lower prices are ordinarily secret (Tr. 47895; 47899; 47900; 47940).

The status of the Glens Falls mill has changed from a non-base mill to a base mill, and back to a non-base mill again. Such changes have been determined solely by the management of the company without discussion, understanding or agreement with any competitor (Tr. 47893). Because of its very small freight advantage and freight advantage area, the present management of the company independently determined to operate the mill as a non-base mill and merely meet prices of competitors (Tr. 47891-93).

The evidence shows that Glens Falls has no understanding or agreement regarding basing points, base prices, or

their use; that it is able to discover bases where used, by deducting freight from destination prices found in the field; and that in quoting on the basis of an assumed base, it has no assurance that competitors will do likewise (Tr. 47912; 47918-20).

Glens Falls does not exchange any price information with its competitors and has no understanding or agreement with competitors regarding the methods by which it arrives at its prices or with respect to the use of delivered prices (Tr. 47899-900; 47912). It quotes destination prices because that is where the market is and the place where all buyers, including state and federal purchasing agents, request and compare prices (Resp. Exs. 3717; 3720 A-F; Tr. 47906-08; 47959). Further documentary proof to this effect was rejected by the Trial Examiner (Tr. 47911; Resp. Exs. for id. 3718-19). The evidence shows that the company has never had any agreement or understanding that it would not sell at f.o.b. mill prices (Tr. 47912).

6. Exception is taken to the failure to report that the lettings referred to in Com. Exs. 387 D and 1099 M (cited in Paragraph 27) occurred during open price filing under the NRA Code and that Glens Falls prices were on file with the Code Authority (Com. Exs. 409 L, R).

7. Exception is taken to the failure to report that Glens Falls prices on Com. Ex. 1099 R were the current market prices at the destinations in question.

8. Exception is taken to the failure to report regarding "meetings" in Paragraph 27 that the meeting referred to (Com. Exs. 3235 Z-108) occurred in December 1911 and to the further failure to report that there is no evidence that Glens Falls attended any meeting where any agreement or understanding regarding prices or marketing policies was reached.

Paragraph 29

(Green Bag of Pennsylvania)

1. Exception is taken to the unsupported implication suggested by Paragraph 82 and the footnote to page 9, that Green Bag Cement Company of Pennsylvania is

"identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the unsupported assertion in Paragraph 82 and the footnote to page 9 that Green Bag of Pennsylvania is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report any of the testimony of the officer of Green Bag of Pennsylvania relating to matters in issue referred to in Paragraph 29 of the Report.

4. Exception is taken to the failure to report the evidence showing that Green Bag of Pennsylvania has never at any time agreed with any competitor to use or employ any particular system or method of pricing or marketing; and has never at any time agreed with any competitor to quote the same price for cement as such competitor at any place, or to any customer, or to make the same bid for any public contract (Tr. 47629-30).

5. Exception is taken to the failure to report the following evidence with respect to bids by Green Bag of Pennsylvania to the Federal Government, referred to in Paragraph 29:

The bid of January 18, 1935, referred to in Com. Ex. 178 A, cited in the Report, occurred during the period when open price filing provisions of the NRA Cement Code were in effect and the invitation to bid required compliance with the Code. The price bid by Green Bag on this letting had been filed with the NRA Code Authority by one of the bidders pursuant to Code provisions and transmitted by the Code Authority to other potential bidders including Green Bag. This price was 20 cents lower than the cur-

rent commercial price at the destination at which bids were requested. The invitation to bid requested destination prices only (Com. Ex. 178 A; Resp. Exs. 810; 811 A-B; 1713 A-N).

The opening of bids referred to in Com. Ex. 1099 W took place on May 18, 1937 and not on May 15, 1937 as stated in the report (See Com. Ex. 1099 W). Com. Ex. 387 i cited as an additional "identical bid" refers to Green Bag's bid of May 18, 1937 and appears in the tabulation of bids represented by Com. Ex. 1099 W. The invitation to bid for the lettings referred to in Com. Ex. 387 i and Com. Ex. 1099 W called for bids f.o.b. destination only and the prices Green Bag bid were the current market prices at the destinations at which bids were requested (Com. Exs. 384 i; 551-2 C; 1166; Resp. Exs. 763; 767; 2292 C; 3715).

On the letting of September 8, 1936, referred to in Com. Ex. 303 D cited in the Report, the invitation called for deliveries f.o.b. destination only and Green Bag quoted the current market price at the destination at which bids were requested (Resp. Ex. 3182 C; Tr. 24034-35; 28044-45).

6. Exception is taken to the failure to report that approximately 65 per cent of the sales by volume of Green Bag of Pennsylvania are made to building material dealers having retail outlets. (Tr. 47629).

7. Exception is taken to the citation of Com. Exs. 1965 A-B accompanying the statement in Paragraph 29 "as to meetings", because there is nothing in this exhibit to indicate that the Green Bag Company named therein is the Green Bag Cement Company of Pennsylvania. Exception is further taken to the failure to report that the meeting referred to in Com. Exs. 1965 A-B was between railroads and traffic representatives of cement shippers, and arranged and held in conformity with customary procedure fostered by the Interstate Commerce Commission for settlement of rate problems involving railroads and interested shippers (Tr. 40876-79).

Paragraph 30

(Green Bag of West Virginia)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Green Bag of West Virginia is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Green Bag of West Virginia is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the chief executive and sales manager of Green Bag of West Virginia, who has directed its policies since it first began to make cement, testified at length regarding the practices and policies of the company at issue and that the evidence shows that Green Bag has never had any agreement or understanding with competitors and has never been a party to any collusive or concerted activity (Tr. 29396; see further below).

4. Exception is taken to the failure to report the following evidence concerning the organization, location and marketing area of Green Bag of West Virginia:

Green Bag of West Virignia began to manufacture cement in 1927 (Tr. 29398). It is a small company, capitalized at $850,000 (Tr. 29397). In 1933 the company went into receivership, which lasted fifteen months (Tr. 29400).

None of the officers or directors of the Green Bag Company have been connected with any other cement producing company and Green Bag Cement Company of West Virginia is not affiliated with Green Bag Cement Company

of Pennsylvania or any other cement company (Tr. 29403; 29404; 29480).

The quarry has a sufficient supply of raw materials for seventy years operation (Tr. 29876). The capacity of the company has been estimated by the management as 600,000 barrels per year. This figure was determined at the time the company began to manufacture cement and was based on the previous capacity of the plant in the manufacture of refractories, and the estimate has been confirmed by actual operations. There has been no increase in capacity of the plant since Green Bag began to operate (Tr. 29480; 29510; 29403). In determining its capacity the company has never used any formula based on the highest production for any successive three months' period and has never acquiesced in or agreed to any estimate of its capacity other than that made by its own management (Tr. 29483; 29403).

Green Bag of West Virginia determines its rate of production according to actual sales and potential sales and has been able to estimate its demand within one or two per cent (Tr. 29509-11).

The company markets its cement in West Virginia, part of Ohio, certain sections of Kentucky, a small part of Virginia and a small section of Tennessee (Tr. 29403-04) and it encounters the competition of ten or more different independent cement manufacturers in each market in which it does business (Tr. 29406).

5. Exception is taken to the failure fairly and adequately to report the evidence regarding the pricing practices and policies of the Green Bag of West Virginia, and particularly to report the following:

Green Bag of West Virginia attempts to meet competition as it finds it at destination because that is where it has found the market to be. It learns of competitors' prices through its salesmen (Tr. 29407; 29515). The company began to quote prices which reflected bases when it started to sell cement because competitors' quotations found in the field, when the official tariff rates were deducted, were found to reflect price bases at various mills (Tr. 29513-15).

The evidence shows that Green Bag of West Virginia has never had any foreknowledge as to which mills are base mills or what a particular base is at any time; that it has never had any agreement to recognize or not to recognize any mill as a base mill, nor any agreement or understanding concerning so-called basing points or base prices (Tr. 29407; 29513; 29515-16; 29879).

The Cement Institute has never influenced or had anything to do with the prices or price policies of Green Bag of West Virginia, and the company has never received any lists of basing points from the Institute or from any competitors, nor given out any lists of basing points (Tr. 29515; 29516; 29879).

There is no one company or mill which is always the price leader in any of Green Bag's territory, to its knowledge (Tr. 29896).

Green Bag assumes the loss for shortage or damage to its shipments in transit and collects the claims in its own name (Tr. 29891).

6. Exception is taken to the inaccurate and misleading report regarding "identical bidding" by Green Bag of West Virginia and to the failure to report the following evidence:

During the entire history of the company, Green Bag of West Virginia has made only one sale of cement to the federal government consisting of a few bags for a small repair job. This sale was made at the company's current commercial price at the delivery point in question (Tr. 29516-17).

During its entire history, Green Bag of West Virginia submitted only one bid on a federal government project (Com. Ex. 373, cited in Paragraph 30). The price bid was the price the company was then currently quoting on cement to its dealers at the destination for which bids were invited. The company did not get the award. Green Bag did not bid on Com. Ex. 386-G cited in Paragraph 30 (Tr. 29541-42).

Because Green Bag is a small producer it has not solicited large contract business, including government projects.

The Company has no facilities for handling such business without interrupting its continuing dealer shipments. Moreover, the company has never manufactured or attempted to manufacture cement called for by special specifications. Accordingly, the company did not submit any bid on Com. Ex. 1339, the invitation by the Procurement Division in March, 1938 (Tr. 29411; 29481, 29541).

Green Bag of West Virginia has never shipped into any territory where land grant rates were involved; it never concerned itself with land grant rates and never used any "control clause" or other qualifying clause (Tr. 29525).

7. Exception is taken to the failure to report the following evidence regarding the membership of Green Bag of West Virginia in The Cement Institute:

The company's membership in the Institute in 1933 was prompted by the N.I.R.A. Although the company filed prices with the Code Authority during the life of the N.I.R.A., it ceased open price filing after the *Schechter* decision and never filed prices with the Institute or the Trade Practice Committee (Tr. 29543). At no time during N.I.R.A. price filing did Green Bag have any understanding or agreement with competitors regarding the prices it would file (Tr. 29543).

Green Bag of West Virginia does not have a Traffic Department. It uses the freight rate books of The Cement Institute for all the freight rate information it uses in connection with its sale and shipment of cement. The Institute rate books have been found much more readily usable and convenient than the use of the various railroad tariffs (Tr. 29408, 29880). The company does not use the rates shown in the Institute rate book if it knows them to be changed or incorrect (Tr. 29518-19).

Green Bag has never used any so-called conversion tables other than a system, which it devised in its own office and has always used, by which it changes freight rates from cwt. to barrels (Tr. 29409).

Green Bag of West Virginia never received any statistical service either from the Institute or from W. S. Mal-

lory prior to the NRA Code period (Tr. 29483). The evidence shows that Green Bag never had any agreement with any competitor concerning the use of statistics, and that it has never made use of the individual figures of any other company (Tr. 29865, 29510-12).

Green Bag of West Virginia has never furnished The Cement Institute with any figures as to its capacity, and it never consulted with the Institute or any of its representatives concerning the capacity of any plant (Tr. 29483). The figures shown for the Green Bag of West Virginia in W. S. Mallory's report (Com. Ex. 3045 C) are incorrect. The correct shipment figures since the company has been operating are shown in Resp. Ex. 1848. Green Bag has never furnished the Institute with figures on capacity (Tr. 29509).

8. Exception is taken to the failure to report the evidence showing that Green Bag of West Virginia has never at any time relaxed its efforts to get all the business which it could and that it has never been a party to any agreement or understanding for the allocation of business or curtailment of production (Tr. 29484-85). Exception is further taken to the failure to report the following:

Green Bag of West Virginia was opposed to all of the proposed plans for sharing business which were suggested in accordance with the provisions of the N.I.R.A. Code.

The company has never made any shipments for any other cement company. On one occasion when the company's plant was shut down because of a flood and strikes, it purchased cement from other manufacturers to fill outstanding orders. In doing this, however, Green Bag notified its dealers that it could not supply its own cement and asked them to specify the brand they desired. Green Bag purchased the cement from the other manufacturers at a manufacturer's discount of ten cents per barrel (Tr. 29509-10; 29875-76).

9. Exception is taken to the failure to report any of the evidence regarding the dealer policies and practices of Green Bag of West Virginia; its terms and discounts; or concerning its practices and policies as to truck and water delivery. This evidence shows the following:

As to Classification of Business:

Green Bag of West Virginia never issued any definition of a dealer and has had no set policy as to whom it will sell as a dealer. It has never had any understanding with competitors or with any dealer organization concerning the qualifications of a dealer. Green Bag sells to any dealer who has handled cement and other building material and has trucks for deliveries and performs other necessary services. Membership or non-membership in a dealer association has never been considered by Green Bag in selling to its dealers (Tr. 29528-30; 29533).

Almost all of Green Bag's sales are made to dealers. Article XI of the Code had no effect on Green Bag of West Virginia's policy. Green Bag has never had any understanding with any respondent concerning classification or definition of its customers (Tr. 29530, 29534-35).

As to Terms and Discounts:

Green Bag of West Virginia has had no understanding with competitors concerning its terms of sale or discount (Tr. 29535). During the NRA Code period the company used a so-called specific job contract form in accepting orders for future delivery. Since the *Schechter* decision, Green Bag has not sold any cement on future job contracts and no longer uses any such form. It never reported any specific job contracts at any time to The Cement Institute (Tr. 29536-37). Green Bag of West Virginia never adopted the Lehigh selling plan. It has never changed its sales policies (Tr. 29532-33).

As to Trucking and Water Delivery:

Green Bag of West Virginia has never had any agreement concerning trucking and it has never taken any concerted action with respect to the loading of trucks or delivery of cement by truck (Tr. 29519-24). No trucking concern has ever approached Green Bag of West Virginia regarding the trucking of cement and Green Bag has never had any contact with any railroad, or dealers association, or with any competitor concerning trucking or short haul rates (Tr. 29522-25). Green Bag of West Virginia has no

demand for trucking or truck loading of cement from any of its customers (Tr. 29882; 29519).

Green Bag of West Virginia has shipped cement in barges whenever its customers desired it. The total shipments made by water were less than 1% of Green Bag's annual shipments (Tr. 29526). Such shipments usually consisted of a full bargeload, which is the equivalent of about 15 carloads, because the tugboats charged as much for half a bargeload as for a full one (Tr. 29528). Dealers were not equipped to handle barge shipments which necessitated double loading and a haul from the dock up to the warehouse, and did not like to put out the cash to handle a bargeload when they could have one carload spotted alongside their warehouses (Tr. 29887-88). Green Bag of West Virginia never had any communication or contact with the Institute or with any competitor or any railroad concerning shipments by water or the use of barges (Tr. 29890). In Green Bag's territory there is no means of transportation as satisfactory as rail either as to service or expense. Shipments by boat cost Green Bag more per barrel than shipments by rail (Tr. 29889).

10. Exception is taken to the failure to report that Green Bag has come into competition with foreign cement only once and has never taken any action with respect to or concerned itself with, imported cement (Tr. 29537-38).

11. Exception is taken to the failure to report the evidence showing that Green Bag never had any agreement, and has never taken concerted measures regarding diversions of shipments in transit (Tr. 29539).

Paragraph 31

(*Hawkeye*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Hawkeye Portland Cement Company was "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its

Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Hawkeye was "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is further taken to the failure to report that the Sales Manager of the Hawkeye company testified fully concerning the policies and practices of the company and their origin and development, including all matters in issue as well as the subjects referred to in Paragraph 31 and that the evidence showed that none of the policies and practices of Hawkeye were arrived at through understanding or agreement (Tr. 41559, *et seq.*).

4. Exception is taken to the failure to report that Hawkeye during the period of the complaint marketed cement in Iowa, Nebraska and Minnesota, and occasionally in northern Missouri and North and South Dakota (Tr. 41610).

5. Exception is taken to the failure to report that Hawkeye rejoined the Institute in June, 1933, because of the advent of NRA (Resp. Ex. 3404; Tr. 41620-21); and that it continued its membership in the Institute after the NRA in the expectation that this governmental agency would be revived (Tr. 41021).

6. Exception is taken to the failure to refer to Tr. 41780-81 and Resp. Exs. 3376-77 and 3406-07 in connection with the pricing policies and practices of the Hawkeye company, and to report the facts shown by this evidence; and further to the failure to report the following:

Hawkeye has made secret price concessions on sales to contractors and on open market purchases by the federal government (Tr. 41782-94; 41836-38; 41841-52; 41936-41; 36695-700; Resp. Exs. 3386; 3399; and 3401).

Hawkeye has bid non-identical prices to the federal and state governments (Tr. 19510-13; 19638-41; 19643-60; 41752-57; Resp. Ex. 3393); and has bid f.o.b. mill prices to the federal government (Manley, Tr. 41766-68; 41872-74; 41933-34; Resp. Ex. 3386).

7. Exception is taken to the failure to report that the only Institute services received by Hawkeye since the Code have been the freight rate service, the statistical service and the services of the Bag Tax Committee (Tr. 41621). Hawkeye compiled and used its own freight rate books and used the Institute rate books only for purposes of checking (Tr. 41916-19; 41821-24; Resp. Exs. 3403, 3405). Hawkeye never used the Institute conversion tables (Tr. 41824).

8. Exception is taken to the failure to report that Hawkeye never used a "control clause" after the Fort Peck letting of June 5, 1934 (Tr. 41872-74; Resp. Ex. 3386).

9. Exception is taken to the failure to report regarding diversion of cement in transit, as follows:

Hawkeye first learned about the bill of lading stamp when it appeared on a bill of lading of masonry cement purchased by Hawkeye in April 1936. Hawkeye thereupon made inquiries of a railroad as to the effect of this clause and learning it would be honored, began to use the stamp in June 1936 (Tr. 41641-48; 41853-57; Resp. Exs. 3369-70).

10. Exception is taken to the failure to report that Hawkeye has not adhered strictly to its announced marketing policies (Tr. 41805-09); that it has never come into competition with imported cement and has never taken any measures with respect to it (Tr. 41614); that Hawkeye never participated in a discussion or consideration of any proposal for a reduction in short haul rates (Tr. 41628); and that water transportation is not available to the Hawkeye company (Tr. 41618).

11. Exception is taken to the reference to Tr. 12793-95 because this evidence was contradicted out of the mouth of the same witness, and in addition the witness was impeached in numerous other respects (Tr. 12876-947;

19567-607; 19622-31; 41723-39; 41810; Resp. Exs. 75-76; 3388-89; 3391-92; Com. Ex. 2230). Exception is also taken to the failure to report that Hawkeye was not a member of the Institute at the time of the interview between Royal and Condon (Tr. 19547).

12. Exception is taken to the citation of Tr. 41630-31, 41660-61, 41637-38, 41823-24 and 41836 on the ground that they do not support the proposition for which they are cited.

Paragraph 32

(*Hercules*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Hercules Cement Corporation is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 62 and the footnote to page 9 that Hercules is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the President of the Hercules company testified fully concerning the policies and practices of the Hercules company and their origin and development, including all matters in issue as well as the subjects referred to in Paragraph 32 (Tr. 10539-618; 25965-26533) and that the evidence showed that none of the policies and practices of Hercules were arrived at through understanding or agreement (Tr. 25990; 26062; 26068; 26085; 26087; 26127; 26137; 26183; 26236; 26173; 26199; 26207; 26222; 26334; 26337).

4. Exception is further taken to the failure to report the following evidence concerning the organization, location and marketing area of the Hercules company:

Hercules was organized in 1916, as a new company. It purchased the cement plant of the Atlantic Portland Cement Company, a cement company which failed and went out of business as did its affiliate, the Northampton Cement Company, which failed and went out of business, after operating for several years (Tr. 25973-76).

Morris Kind was the President of the Hercules company until his death in March 1933 (Tr. 26190). The majority of the stock of the Hercules company is owned by the late Mr. Kind's widow and by members of the family of the late Senator Wolf, a former officer and stockholder. The stock held by outsiders not directly connected with the management is distributed among about 200 individual stockholders who own about 50 shares apiece (Tr. 25971; 25966). Hercules is not affiliated with any other cement company and no other company has any voice in its management (Tr. 25972).

Hercules has only one mill, which is located at Stockertown, Pennsylvania, in the Lehigh Valley (Tr. 25974). This location was chosen because a good deposit of cement rock is located there. Recent drillings show that Hercules' supply of first-class rock is sufficient for over 25 years (Tr. 25978-79). There is no suitable deposit of rock nearer to any of Hercules' large markets (Tr. 25979; 25987).

Hercules sells in Massachusetts, Rhode Island, Connecticut, New Jersey, New York, eastern Pennsylvania and small portions of Delaware and Maryland. Hercules has salesmen in all of those territories (Tr. 25981; 25986). Since 1933 Hercules has added six men to its sales force in order to meet the increased competition and in an effort to get more business (Tr. 25987). Hercules obtained a larger percentage of the available business in its district in 1936 and 1937 than it did in 1932 and 1933 (Tr. 26484).

In its principal markets Hercules encounters the competition of from 15 to 20 different independent cement manufacturers and it has to compete with at least seven or eight competitors in any one of its markets (Tr. 25982).

This is true with respect to competition for federal, state or municipal business as well as for commercial business (Tr. 25986). Hercules never declined to quote on any business within its normal marketing area (Tr. 25981). Hercules has no fixed market area; the territory in which it solicits business varies and depends on a number of factors, among which are the following: volume involved, selling expense, relationship with the customer, ability to render service, and amount realized at the mill after deducting freight rate from destination (Tr. 35991-93). Since 1933, Hercules has abandoned solicitation in Maine, Washington, D. C., Buffalo, N. Y. and Oswego, N. Y. because it could no longer compete, either in service or price, with competitors whose mills were situated locally. Solicitation in markets of western Pennsylvania was also abandoned by Hercules because of its inability to compete in service with mills situated nearer to those markets (Tr. 25998-99). In an effort to get business in Washington, D. C., Hercules put in a loading plant and spent $3,000 on facilities to serve customers locally, but the business obtained was not large enough to warrant the expense and Hercules abandoned the market entirely (Tr. 25998).

5. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of Hercules:

Hercules' customers are not interested in mill prices and the company has found that there is no market for cement at its mill. Its market is at the point of delivery to the customer who is going to use it and this has been so on sales to the federal government as well as on commercial business. Accordingly, Hercules quotes delivered prices (Tr. 26140; 26380; 26397).

The Hercules company has always attempted to quote the lowest price it knows of in a given market. It obtains information as to competitors' prices from dealers and contractors and from its salesmen's reports, and through its salesmen the company knows the prices for which cement is selling in every town in its marketing area. Hercules has never had occasion to quote a price at any destination where it did not find a price quoted by at least one other

competitor. There has never been any price change which Hercules did not learn of from its customers and its salesmen on the day the change in price was announced to buyers (Tr. 26079-82; 26101-02).

Competitors have never, at any time, supplied Hercules with information as to their prices. Hercules has always been free to sell cement at any price that it chose and has never had any contact with competitors which would prevent it from doing so. The evidence shows that the policies and practices of Hercules with respect to its prices have never been guided or influenced by the views of anyone outside the company's own management (Tr. 26087; 26127-28; 26082; 26450; 26136-37; 26456).

When Hercules discovers any changes in prices it checks all price quotations that it finds in the general territory to determine how extensive the change is and analyzes such prices to determine the nature of the changes. When such changes appear to reflect bases at particular mills, Hercules lists such bases and keeps the list for future reference. On many occasions, however, prices so checked are not related to any apparent price base. Hercules has never had any foreknowledge as to which mills are or will be base mills (Tr. 26083-84; 20685).

Stockertown is in the Lehigh Valley, about ten miles from Northampton. Since the mill at Northampton has always reflected a base of greater or less extent, the Hercules mill has in effect also reflected a base because of the common freight rates from each mill. There are eight competitive cement plants (Nazareth, National, Lone Star, Penn-Dixie, Keystone, Lehigh, Lawrence, and Universal Atlas) situated between Stockertown and Northampton. Hercules is not able to sell cement in Northampton or in the small area between its mill and Northampton because the local cement plants secure what local business there is (Tr. 26092-94). Hercules has only one customer in Stockertown and its total business there consists of about 600 barrels a year, or about one twentieth of one per cent of its total shipments. Hercules pays a switching charge on cement delivered to this dealer (Tr. 26095; 26096; 26097).

Hercules has found that competitors make "secret" prices or rebates which do not remain secret very long be-

cause the customer who is given a secret price tries to get the same price from other manufacturers (Tr. 26099).

The company has also found that competitors have always met any lower price found in its territory (Tr. 26127-28). Hercules does not regard any particular one of its competitors as a price leader. A number of different companies have led in advancing or reducing prices at different times (Tr. 26136).

Hercules has found that when it meets a price reduction it has to give the benefit of the decline on cars that have been shipped and, in some cases, cars that have already arrived and been accepted, in order to place its customer in as good a position as his competitors who have purchased cement at the new lower price. When deliveries were slower it was Hercules' custom to make a decline in its prices retroactive six, seven or eight days in order to protect its customers and keep them in a position to compete (Tr. 26104-06). Hercules' practice today is to give the benefit of a decline to any customer the management thinks is really entitled to it.

In case of a price advance which Hercules decides to meet, it never realizes the new price on shipments for at least a month after the price change, and the new price is not realized on any substantial amounts of shipments for many months, because the customers stock up at the old price (Tr. 26113; Resp. Exs. 1088 A-B). Hercules allows dealers to take all the cement that they will take delivery of for fifteen days at the old price after the new price goes into effect (Tr. 26123). In the case of cement already contracted for, Hercules protects the contractor on any decline and so states in its contracts. On the other hand, in the case of an advance in price, the contractor is protected at the contract price no matter what the amount of the advance is, and this has always been Hercules' policy (Tr. 26124; 26125; 26144; 26149-50).

6. Exception is taken to the failure to report the following evidence regarding the bids of Hercules referred to in Paragraph 32:

Prices bid by Hercules on Com. Ex. 1099 M where the current commercial prices at the destinations involved.

Moreover, this letting occurred during open price filing under the NRA Code and the Hercules prices quoted in this instance were on file with the Authority (Resp. Exs. 763; 764; 766-8; 7774; Com. Exs. 409 L-R).

The prices bid by Hercules on Com. Exs. 303 D and 1099 W were the current commercial prices at the destinations involved and many of them had no relation to the sum of any price base plus freight (Tr. 24042-43; 28044-45; Resp. Exs. 763; 764; 766-8; 7774; Com. Exs. 551 O, V and X; 1116; Resp. Ex. 3715).

7. Exception is taken to the further failure to report the following evidence regarding Hercules' sales to government agencies:

In 1932 Hercules sold one per cent of its annual sales to the federal government. This was the highest percentage such sales ever reached. In other years from 1926 to 1937 sales to the federal government have ranged from nothing to ½ of one per cent of its total annual sales (Resp. Ex. 1091; Tr. 26162; 26396).

Hercules has never made any quotations or solicited any business in territory where land grant rates were available to the government. It has never used any so-called "control clause" (Tr. 26174).

Hercules received proposals from the federal government subsequent to the complaint in this proceeding, to furnish an unlimited quantity of cement. One of these was Com. Ex. 1339. Hercules considered that this proposal was merely an option to buy an unspecified amount of cement over an unspecified delivery period under the terms of which the government was not required to take one barrel. Hercules was reluctant to bind itself to furnish an indefinite quantity when it did not know whether it would get any of the business (Tr. 26158). The proposal provided, further, for delivery in June, 1938; at the time of the opening of bids on May 18, 1938, Hercules had no contract and no cement under test and it could not possibly have furnished any cement by June 1st because it could not by that time have had the results of the 28-day test, which the government insists on before it will accept any cement (Tr. 26160). It did not submit any bid and explained its reasons for not

doing so in its letter of May 17, 1938 to the Procurement Division (Tr. 26153). Further evidence explaining Hercules position on this invitation was rejected by the Trial Examiner (Resp. Ex. 1090 for id.).

Hercules received a further invitation from the Procurement Division in May 1938, calling for delivery in Ohio and West Virginia (Com. Ex. 1392). It did not bid because it had not shipped to either of those states for many years and did not consider that it could quote prices low enough to compete with manufacturers situated nearer the points of use.

Hercules has never had any contact with any competitor concerning Government bids or invitations (Tr. 26161).

For the purpose of insuring that Hercules' cement will conform to standard specification and that cement purchased by the government will be properly tested, the Hercules' laboratories are inspected every eighteen months by the Bureau of Standards of the United States Department of Commerce (Tr. 26290). Further proof on this subject was rejected by the Examiner (Resp. Exs. 1101-02 for id.).

In order to meet competition Hercules tests other companies' cements frequently to insure that its product is up to the best standard maintained by any competitor. Its own cement, however, always exceeds the minimum specifications (Tr. 26294-95).

In recent years there has been an increase in the demand for special specifications and it has become more difficult and costly for Hercules to make and store these cements. For example, in order to meet the specifications issued by the New York State Highway Department, Hercules found it necessary to add limestone, iron pyrites and sand to its normal ingredients, all at extra cost. Hercules, however, was unable to obtain any premium for the cement it made to this specification because competitors whose plants are located in the Hudson Valley were able to meet this specification with their normal cement, and Hercules had to meet the lowest price quoted or forego the business (Tr. 26302; 26348-49). Similarly it cost Hercules more to manufacture a dark colored cement de-

manded by some of its customers, yet it had to meet the lowest prices quoted by mills in the Hudson Valley whose product is naturally darker than the product of the mills situated in the Lehigh Valley (Tr. 26306; Resp. Exs. 1104-05).

8. Exception is taken to the failure to report the following evidence regarding Hercules' membership in The Cement Institute:

Hercules uses the freight rate books of The Cement Institute for its freight rate information. It has found that they are convenient and save time and expense (Tr. 26164). Prior to subscribing to The Cement Institute freight rate service Hercules used the freight rate books of the Nazareth Traffic Bureau in the same way and for the same purpose as they use the Institute books today (Tr. 26170; Resp. Exs. 1092-93). The evidence shows that Hercules never had any understanding with any competitor concerning the freight rate books (Tr. 26172-73).

Hercules has received the Institute statistics and has used them as an indication of the current business available in its territory. The advantage of the Institute statistics is that they are received four or five weeks earlier than the figures of the Bureau of Mines. Upon receipt of the latter, however, Hercules has discarded the Institute figures and used the Bureau of Mines figures because it believed them to be more complete and accurate (Tr. 26239; 26484-85). Hercules has never concerned itself with statistics in any district outside of its own sales territory. Hercules has never had any interest in the figures of shipments of individual companies or the relative shipments of the different companies in its territory (Tr. 26238; 26241; 26486).

Hercules has never furnished The Cement Institute with any information as to its capacity but has furnished the Bureau of Mines with capacity figures for its plant (Tr. 26245).

Hercules could produce 2,000,000 barrels of cement annually if it were manufacturing a normal cement. Hercules estimates the capacity of its plant on its actual operating experience, taking into consideration its storage facilities

and its clinker grinding capacity. The company has never used any capacity figures in planning its operating schedule, but bases it on its estimates of the potential demand, made from governmental statistics of building activity, from Dodge's Reports, from Moody's Reports, from Dun's Reports, and from information on building statistics in The Cement Institute reports. This estimate is adjusted from month to month to meet actual conditions as they arise (Tr. 26243; 26489). The rate of operation of the Hercules plant has always been determined individually by its own management without any consultation or contact with any competitor (Tr. 26236). Hercules has never used the Institute statistics to regulate its production (Tr. 26246). There is no difference between the use Hercules made of the Bureau of Mines statistics and the use made of the Institute statistics (Tr. 26247). Hercules has never participated in, or known of, any arrangement for allocation of business in its territory (Tr. 26270).

During the NRA period Hercules followed the Code of Fair Competition of the cement industry (Com. Ex. 557), as approved by President Roosevelt, because it was told by its attorneys that the Code was the law (Tr. 26065; 26068).

The evidence shows that Hercules had no agreement with other respondents regarding its trade practices or prices through the Institute's Code of Ethics or otherwise through the Institute. The Institute has never had anything to do with the question as to whether Hercules will quote destination prices or mill prices (Tr. 26441-42; 26336).

9. Exception is taken to the failure to report the following evidence regarding delivery of cement to trucks by Hercules:

Hercules has never had any contacts or understandings with competitors concerning trucking. There is no demand for truck delivery at the Hercules plant (Tr. 26183-84). Hercules' largest years of delivery to trucks occurred in 1928 and 1929 when such sales amounted to 3 per cent of Hercules' total sales for the year. In other years such sales ranged from .4 of one per cent to one per cent (Resp. Ex. 1094). Hercules found that the cost

of handling truck sales was higher than the cost of handling cement on a carload basis and that trucking created substantial inconvenience and interference with carloadings (Tr. 26182). Hercules lost money in every year of its operations in trucking cement for customers from 1925 to 1930. Further proof concerning Hercules' losses in operation of trucks was rejected by the Examiner (Tr. 26187; 26468; Resp. Ex. 1095 for id.).

10. Exception is further taken to the failure to report the evidence showing that the Hercules plant is so situated that water transportation has never been available as a method of distributing its cement; that there has never been any occasion nor opportunity for Hercules to ship by water, and that there is no mode of transportation in Hercules' sales territory that is cheaper than rail (Tr. 26191).

11. Exception is taken to the failure to report the following evidence concerning the dealer policies and practices of Hercules:

Hercules never used any general sales agent or distributor; there has never been any middlemen between the Hercules company and the dealer (Tr. 26020). About 90 per cent of Hercules' sales have been made to dealers (Tr. 26022). Hercules has increased the number of dealers to which it sells since 1933 (Tr. 26028). Hercules' dealers have yards, warehouses and trucks for servicing customers and they take care of credits.

Hercules maintains a Service Department solely to give technical advice to customers. To the extent permitted by the Examiner it was shown that Hercules has rendered valuable services to contractors in the nature of locating jobs and obtaining information as to raw materials, aggregates, water supply, transportation facilities, railroad sidings and local conditions, the extent and value of these services has increased since 1933. Further proof as to the extent of the various services rendered by Hercules to various classes of customers and the difference in the value of such services and the value of competitors' services was rejected (Tr. 26042-44; 26050-51; 26053; 26055; and see Examiner's Report, Paragraph 228).

Hercules has no rule as to what constitutes a dealer. It investigates each individual case and passes upon the information brought in by the salesmen concerning yards, investments and facilities. Its policy as regards selling to dealers depends on the size of the town and the nature of the demand. Where there is any question as to which of two or more dealers Hercules will select as its representative, the decision is based on which of the firms is likely to give Hercules the most business in the long run (Tr. 26064; 26056-57; 26058-60; 26427). Further evidence as to Hercules' policy and practice in selecting its dealers was rejected by the Examiner (Resp. Ex. 1085 for id.). The Cement Institute has had nothing to do with Hercules' policy as to whom it will sell as dealers. The company has always freely exercised its own individual judgment in selecting its dealers. Membership or non-membership in a dealer association has never been considered by Hercules as a factor. Hercules has sold to dealers who were members of associations and some who were not. Hercules has never discontinued selling to any dealer because another manufacturer stopped selling him (Tr. 26062-63).

Hercules makes more sales direct to consumers today than formerly, both as to volume of sales and the number of consumers. The classes of work which Hercules sells direct to the consumers are not readily serviceable by the dealer. The customers have facilities for handling cement at the point of use and the financial risk in selling to those customers is less than in selling the ordinary customers of the dealer (Tr. 26428; 26066-67). Hercules never had any contact with any competitors concerning its classification of business. Its policy has been determined by the best interests of its trade and its own best interests (Tr. 26068).

12. Exception is taken to the failure to report the evidence regarding "meetings" which shows that Hercules never attended any meetings at which any agreement or understanding was arrived at to bind the company to use or follow any terms or conditions (Tr. 26340). The President of Hercules testified that he was in a position to know whether or not Hercules had ever participated in any agreement or understanding with competitors at any time (Tr. 26334).

Hercules may have considered certain policies advisable and may have followed them for that reason, but it never agreed to follow any policy and never followed any policy because of agreement with any competitor (Tr. 26337; 26169).

13. Exception is taken to the failure to report the following evidence regarding Hercules' competition with imported cement:

Hercules comes into competition with imported cement in about 50 per cent of its sales area. Hercules has never been able to meet imported cement prices because they have been too low, yet the company could not abandon such markets because they have been its principal markets ever since it has been in business (Tr. 26192-94). In order to continue in those markets, Hercules has met the special prices which it has found quoted by domestic competitors at times in the seaboard area (Tr. 26196; 26198; 26218).

In July 1935 Hercules put in a stock of cement in Brooklyn to meet the competition of stocks of cement established by some of its domestic competitors, including respondents and non-respondents. Hercules learned of this competition through salesmen's reports and through dealers (Tr. 26212-13). Although Hercules did not favor this method of selling Hercules sold these stocks at prices and terms to meet the competition which it found in order to keep its standing with the trade in Brooklyn. Hercules discontinued its stocks when it found that some of its competitors had done so (Tr. 26216-17). The evidence shows that Hercules had no agreement with competitors and took no concerted action in regard to the stocks in Brooklyn (Tr. 26218); that Hercules has never had any agreement or understanding with any other respondent concerning its prices in port areas; and that its attempts to meet the competition of imported cement have been carried on independently in all respects (Tr. 26199-200; 26207; 26203-05; 26210; 26476; 26222-23).

Hercules has always regarded its cement as its own property until accepted by the customer, and has always allowed all claims of customers for loss or damage in transit (Tr. 26008-10).

Paragraph 33

(Hermitage)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Hermitage Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Hermitage is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the sales manager of Hermitage appeared as a witness on its behalf and testified fully regarding the practices and policies of the company as well as their origin and development. This testimony was directed to the charges in the complaint as well as evidence offered by Commission's counsel affecting Hermitage, and included all subjects referred to in Paragraph 33 of the Report (Tr. 36096-443; see more specifically below).

4. Exception is taken to the failure to report the following evidence in connection with the organization and location of the Hermitage Company:

Hermitage furnishes between 75% and 80% of the cement consumed in Nashville, and approximately 10% to 20% of the company's shipments are sold in and around Nashville (Tr. 36108-09). The Hermitage mill is surrounded in all directions by mills of competitor companies and the area in which Hermitage has a freight advantage over such competitors is a very small one (Resp. Ex. 2648). In order to obtain sufficient business to keep the plant operat-

ing it has been necessary for Hermitage to solicit business and sell in an area somewhat larger than that in which it has a freight advantage. Nevertheless 77% of the company's shipments in a typical year were made to destinations within 150 miles of the mill (Resp. Ex. 2647). The marketing area of the company has shrunk due to the erection of new mills, lower prices, and keener competition (Tr. 36119-20). In its entire marketing area Hermitage competes with twenty other cement companies (Resp. Exs. 2649 A, B).

From the time the company was organized in 1924 until 1930, Hermitage cement was sold through an exclusive sales agent and the company had no sales department of its own (Tr. 36097-98). When the sales department of Hermitage was organized in or about 1930 no changes were made in the sales practices and pricing policies that had been used by the exclusive sales agent (Tr. 36123-25).

5. Exception is further taken to the failure to report the following evidence in connection with the membership of Hermitage in the Cement Institute:

So far as Hermitage is concerned The Cement Institute has never been a vehicle for interpreting its policies or assisting members in determining their policies, and the practices and policies of Hermitage have not been formulated, guided or interpreted in any way by the Cement Institute (Tr. 36252; 36333-34). The evidence shows that Hermitage had no agreements or understandings with any competitors regarding its marketing policies or practices by reason of any meeting of The Cement Institute or otherwise (Tr. 36257-62; 36265-66; 36334-35; 36253-56; 39566-71).

The Hermitage Company has used freight rate books since 1924. Its original books were prepared at great cost in time and money and were used in connection with its marketing of cement (Tr. 36152-57; Resp. Exs. 2656 A-Z159; 2657 A-Z103). The Institute rate books have represented a substantial saving and convenience to Hermitage and the company has used them in substantially the same manner that it previously used its own (Tr. 36157-58;

36168-69). It has had no understanding or agreement regarding the use of the Institute rate books (Tr. 36166).

6. Exception is taken to the failure to report the following evidence regarding the pricing practices of Hermitage:

The evidence shows that Hermitage has never had any understanding or agreement with any competitor regarding its prices or its pricing methods (Tr. 36121-22; 36334-35).

During the entire time that Hermitage has been in business practically all requests of customers were for delivered prices and the Hermitage company has accordingly sold its cement at delivered prices with certain exceptions (Tr. 36121-23). Hermitage has always been a price follower, *i. e.*, it meets the competition it finds or withdraws from the market (Tr. 36125; 36342-43). The company learns of competitive prices through its salesmen and customers and keeps a visible card index of the prices it finds. This index is referred to for quoting prices until Hermitage learns from its customers or salesmen of lower prices quoted by competitors (Tr. 36125-29; 36342-44). Further evidence on this subject was rejected by the Examiner (Resp. Exs. for id. 2650; 2651).

From time to time the Hermitage company has quoted prices lower than the prices of competitors and lower than its own quoted prices at various destinations. The company has found that its competitors likewise sell at prices lower than their published prices (Tr. 36135-38; 36360-61).

7. Exception is taken to the failure to report that although some of the prices bid by Hermitage have been identical with the prices bid by competitors there have been frequent variations in prices on bids (Tr. 36320-24; see also *e. g.*, Resp. Exs. 2705-06; Tr. 36295-98; 36300-01).

8. Exception is further taken to the failure to report the following evidence regarding Com. Ex. 180 (cited as an identical bid in Paragraph 33).

The delivered price of $2.55 quoted was the current market price for cement at Monroe, La. (Resp. Ex. 859). The destination cost of $2.31 was based on a land grant rate furnished to individual bidders by the L. and N. railroad (Resp. Ex. 897; Tr. 25336-37; 31895; Resp. Ex.

2284 A) Fractions of a cent in the destination cost bids were omitted because one of the bidders on a previous letting had obtained an award by so doing and competitors on this bid, anticipating a recurrence, did likewise (Resp. Ex. 896; Tr. 25333; Resp. Exs. 2046 B; 2284 A). The evidence shows that there was no agreement or understanding as to the prices bid on this letting (Resp. Exs. 859; 896-7; 2284; 3046; Tr. 25329-33; 31894-95).

9. Exception is taken to the failure to report that Hermitage's prices on Com. Ex. 1083 (cited in Paragraph 33) were the current market prices at the destinations involved and that the railroads provided bidders with the land grant rates available to the government (Resp. Exs. 930-8; 921-9).

10. Exception is further taken to the failure to report the following evidence regarding the bidding practices of Hermitage:

Prior to the NRA Code period, government invitations to bid largely called for destination prices. Hermitage, however, did quote the government f.o.b. mill on the occasions when f.o.b. mill bids were requested (Tr. 36318-19). States calling for bids also requested destination prices. In responding to federal or state invitations requesting delivered prices Hermitage's practice is to quote its commercial price for the destination in question, taken from its card index of current prices (Tr. 36329; 36285; 36326-27; see Resp. Exs. 2710, 2651 A-L for id.). When the delivery point is a place where barge or other delivery may be available, Hermitage, attempting to anticipate and meet competition, considers the cheapest mode of transportation available in determining its bid or, as has occurred, quotes the lowest figure last quoted at the point in question by any competitor. On still other occasions Hermitage has refrained from submitting any bid because it did not believe it could meet the competition of other mills more advantageously located (Tr. 36316; 36318; 36298; 36300-01; 36293; Resp. Exs. 2703, 2705-06; Tr. 36284-85).

Hermitage has quoted the government f.o.b. mill when requested during and since the NRA Code as well as before (Tr. 36319; Resp. Ex. 2704; Tr. 36294; 36311-12; 36353;

36354-55) and it has found competitors doing likewise (Tr. 36318; 36319-20). When land grant rates have been available, Hermitage has used them in determining its bids (Tr. 36324-25; 36329-30; 36355-57).

The evidence shows that at no time has Hermitage had any agreement or understanding with any competitor regarding its prices on bids or any advance information (except for the NRA price filing period) as to the prices competitors would quote (Tr. 36329; 36330; 36332-33; 36319; 36334-35).

11. Exception is taken to the failure to report the following evidence in connection with delivery to trucks by Hermitage:

The Hermitage company discontinued delivery to trucks in February, 1933, by announcement to its trade. All of the competitors of Hermitage had discontinued delivery to trucks at least a year prior to the time that Hermitage did. The company acted finally because of and in response to the substantial and constant complaints of its customers that delivery to trucks was disrupting their markets (Tr. 36173-76; 37179-80; 36382-83; Resp. Exs. 2661-68). Hermitage had always followed a consistent policy of protecting its dealers in their respective markets from encroachment by other dealers by refusing to sell cement to the latter for delivery in the town of the former (Resp. Exs. 2679-82). It had from time to time ceased to permit individual customers to obtain truck delivery because they disrupted this company policy (Tr. 36176-77; Resp. Exs. 2662-64). The decision to stop trucking generally was the outgrowth of this consistent company policy and it was greeted with satisfaction by Hermitage customers (Resp. Exs. 2665-68).

Hermitage never had any understanding with its competitors regarding the delivery of cement to trucks (Tr. 36176). It never imposed at 15 cent or any other charge for loading trucks at the mill. Delivery to trucks never amounted to much and the company has continued to make some deliveries to customers' trucks from time to time since 1933, when it was thought good business to do so (Tr. 36182-83; Resp. Exs. 2669; 2646).

12. Exception is taken to the failure to report the following evidence regarding the dealer policies of Hermitage:

The company's dealer policies have developed over a period of many years. As competitors changed their policies from time to time in ways more favorable to customers Hermitage had to meet that competition or forego the business (Tr. 36191). In December, 1930, after attempting to sound out customer reaction, Hermitage independently adopted the dealer service payment plan inaugurated by the Lehigh company. It independently abandoned the plan shortly afterward when complaints from customers made it apparent that it was not acceptable to them (Tr. 36191-93; Resp. Exs. 644; 2670-74; Tr. 36199-200).

Article XI of the NRA Cement Code represented substantially the sales policy pursued by Hermitage prior to the Code and when that Article was suspended Hermitage continued to sell in the same way for a period of years until changes in competitive policies made it necessary for Hermitage to make similar changes (Tr. 36190; 36201-02; 36202-04; Resp. Exs. 2675; 2677; 2698; Tr. 36244-46; Com. Exs. 813-2B; Tr. 36246-47). Hermitage has always selected its dealers, independently, and on the basis of their ability to provide a suitable outlet for its product (Resp. Exs. 2675-77).

The evidence shows that the company has never had any agreement or understanding with competitors with respect to its dealer policies and each change in its policy was adopted by the company independently and without consultation with others (Tr. 36250; 36335; and, see preceding citations under this exception).

13. Exception is further taken to the failure to report that Hermitage has never had any practice or policy of refusing to sell cement to dealers trading in imported cement, nor has the company ever taken any steps to combat the sale of imported cement (Tr. 36335).

14. Exception is further taken to the failure to report that Hermitage was opposed to the diversion of its cement in transit by its customers since the day it began to sell (Tr. 36337). The company discovered the use of a bill of

lading stamped to prevent diversion on a bill of lading covering White cement it bought from the Medusa company in September, 1935. It was adopted by Hermitage in October because the sales manager and traffic manager of the company thought it was a good idea. The evidence shows that Hermitage had no agreement, understanding or consultation with any competitor regarding its diversion policy or the use of this stamp (Tr. 36233-37; Resp. Exs. 2696-97).

Paragraph 35

(Idaho)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Idaho Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Idaho is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication that the acts and practices of Idaho are in any respect similar to or identical with the acts and practices of the other respondents or that any of them were adopted or used pursuant to agreement or understanding with any competitor. Neither implication is supported by any evidence. Further exception is taken to the failure to report the testimony of the sales manager of Idaho showing the contrary (Tr. 47638-39).

4. Exception is taken to the failure to report that there is no evidence that Idaho submitted any sealed bid to any government agency, state or federal, which was identical

with prices bid by competitors. Further exception is taken to the failure to report the evidence showing that each bid submitted by Idaho was an f.o.b. mill bid and that Idaho's prices were not identical with the prices bid by competitors (Com. Exs. 1328; 1329; 1330; 1331).

5. Exception is taken to the failure to report that Idaho's policy and practice with respect to sealed bids as shown by the government's evidence has been to "use the price the competing mills secured business with on previous bids and either meet it or bid a little under it" (Com. Ex. 3171 C).

6. Exception is taken to the failure to report that Idaho has always made delivery to customers' trucks at its mill without restriction; that the Company has never deviated from that practice; that this is shown by Com. Exs. 967-6R, cited in Paragraph 35; that it is shown further by Com. Ex. 2695 (1-90) representing the invoices of Idaho produced under subpoena by the Federal Trade Commission and covering all shipments to dealers during the month of April, 1938. Further exception is taken to the failure to report that of the 4236¾ barrels of cement shipped during April, 1938, 3344¾ barrels were delivered to customers' trucks at the mill at an f.o.b. mill price of $2.50 per bbl. in paper or $2.75 in cloth in every instance (Com. Ex. 2695 (1-90)).

7. Exception is taken to the failure to report that there is no evidence regarding the practice or policy of Idaho with respect to sales direct or through dealers, or diversions in transit.

8. Exception is taken to any implication in the statement "as to meetings and discussions" that any of the practices or policies of Idaho at issue have been the subject of any discussion with competitors or meeting attended by a representative of Idaho because such implication is contrary to the evidence (Tr. 47638-39). Further exception is taken to the failure to report that there is no evidence that Idaho participated in any meeting or discussion (other than meetings of The Cement Institute) since 1930, and that the Company became a member of The Cement Institute in

November, 1933, in order to participate in N.I.R.A. (Com. Exs. 617 A-E).

9. Exception is taken to the failure to report that Idaho has never used freight rate books published by The Cement Institute and that the Institute has not published any freight rate books for the area in which Idaho does business (Tr. 3156; 16852-53).

10. Exception is taken to the failure to report that Oregon and Washington mills ship into Idaho (Tr. 13892-93).

Paragraph 36

(*Lone Star*)

1. Exception is taken to any implication in Paragraph 36, together with Paragraph 82 and the footnote at page 9, that the policies and practices of Lone Star Cement Corporation have been adopted or carried on as the result of understandings or agreements with any other respondent on the ground it is not supported by the evidence.

2. Exception is further taken to the failure to report that the president, the vice-president in charge of sales and the general sales manager of Lone Star appeared as witnesses and testified concerning the practices and policies of the company and their origin and development, including all matters in issue and all the subjects referred to in Paragraph 36 (Tr. 6019-6738; 6832-77; 6896-99; 32628-907; 33030-290; 34548-755).

3. Exception is further taken to the failure to report the evidence which shows that Lone Star's policies and practices have not been arrived at or carried on through understanding or agreement with any competitor (Tr. 6631; 6639; 6650; 6656; 32631; 32721-22; 32737-38; 32746; 32772-73; 32779-80; 32805-06 32825; 32829-34; 32839-41; 32866; 33074-75; 33078; 33099; 33092; 33105; 33141; 33146; 33148-50; 33152-54; 34550-56; 34560; 34567-69; 34572-73; 34663-64; 34668; 34671; 34677-80; see further below).

4. Exception is taken to the failure to report the following evidence concerning the organization of Lone Star and the history and location of its mills.

At the time of its incorporation in 1919, the International Cement Corporation was the owner of all outstanding stock of a number of operating subsidiary companies located in the United States and in Latin America (Tr. 34667).

Lone Star's principal office has always been in New York City. It owns ten domestic cement plants and a silo which are operated under division offices in eight states: New York, Virginia, Alabama, Louisiana, Texas, Kansas, Indiana and Pennsylvania. The Lone Star plants are located as follows: Hudson, N. Y.; Nazareth, Pa.; Norfolk, Va.; Spocari and Birmingham, Ala.; Houston and Dallas, Tex.; Bonner Springs, Kan.; Limedale, Ind.; and New Orleans, La. The silo is at Washington, D. C. All the plants except Norfolk and New Orleans were acquired by purchase prior to May 1, 1928. The Norfolk plant was built in 1924 and 1925 on a site at which there had previously been a cement mill. The New Orleans plant was built in 1926 and 1927 on a new site (Com. Ex. 1178 A; Resp. Ex. 2348; Tr. 6020; 25999-26001; 26378; 26865-68; 31141-47; 32866-84; 34631; 34667-68).

Lone Star is not affiliated with any cement company other than its foreign subsidiaries, and no officers of Lone Star are officers of any other cement company. It has approximately 11,500 stockholders. No other cement company owns any substantial part of its stock which is listed and traded on the New York Stock Exchange (Tr. 32631; 34668).

Lone Star markets its cement in the area east of the Rocky Mountains, except for western Pennsylvania, eastern Ohio, the greater portions of Kentucky, Michigan, Wisconsin, New Mexico and Iowa, and, a few isolated shipments excepted, North and South Dakota, Minnesota, Colorado, Wyoming and Montana. Each division office has jurisdiction over sales in a definitely assigned portion of the total marketing area, and over the Lone Star plants and silos in its territory (Resp. Exs. 2348; 2460; Tr. 6044-45; 32641-46; 34667-68).

The boundaries of the company's marketing area are not fixed but vary according to the volume of available business, mill net realized on each sale, cost of securing the business and the relationship with particular purchasers. Lone Star has been forced to withdraw from several areas in which it formerly solicited business because prices were too low to provide adequate return (Tr. 6044; 6087-88; 32645-49). Lone Star does not come into competition at any point with the following cement companies: Beaver, Calaveras, Cowell, California, Colorado, Idaho, Monolith, Northwestern, Oregon, Pacific, Portland of Utah, Riverside, Santa Cruz, Spokane, Superior, Inc., Three Forks, Union, Washington-Idaho and Yosemite (Resp. Ex. 2348; Com. Ex. 3113).

As of 1937, the total annual capacity of Lone Star's ten mills was 16,800,000 barrels. The company's total production in that year was 6,193,370 barrels and its total shipments, 5,999,483 barrels. The 1937 capacity figure represents a 1,200,000 barrel decrease over the company's total capacity figure as of 1933. In the latter year, after three years of depression, Lone Star's production and shipments reached the all-time low points of 3,814,214 barrels and 3,542,851 barrels respectively (Com. Exs. 1178 B-C). The company's marketing area, production or shipments have never been the subject of any understanding or agreement with competitors (Tr. 34567-69).

7. Exception is taken to the statement in Paragraph 36 that International Cement Corporation joined the Cement Institute on June 2, 1930 on the ground that it is not supported by the citations or by the evidence. Exception is further taken to the failure to report the evidence regarding Lone Star's membership in The Cement Institute as follows:

International Cement Corporation was never a member of the Cement Institute. Its subsidiaries, the Lone Star companies of New York, Pennsylvania, Virginia, Alabama and Louisiana were elected to membership in the Institute on December 27, 1929; the Lone Star companies of Indiana and Kansas on January 13, 1930. They all resigned in October 1930. Lone Star of Texas was never a member of the

Institute prior to June 1933 (Com. Exs. 136 AA-BB; Resp. Ex. 2173-B; Tr. 34667). The Lone Star companies which joined The Cement Institute in 1929-1930 did so for two reasons: The Institute was to provide an avenue for a Trade Practice Conference with the Federal Trade Commission; and the statistical information to be furnished by the Institute—understood to be similar to that supplied by the former Cement Manufacturers' Protective Association—was desirable (Tr. 34560-62; 34565).

The Lone Star companies resigned from the Institute in October 1930 because it was then apparent that a Trade Practice Conference would not materialize and the statistical information thus far supplied by the Institute was incomplete and of little value (Com. Exs. 136-3F; 140 A; Resp. Ex. 143 D; Tr. 34565-67).

The Lone Star companies that had previously been members rejoined the Institute and the Lone Star Company of Texas which had not hitherto been a member joined the Institute on June 15, 1933, in order to participate in the formulation of an NRA Cement Code pursuant to the provisions of the National Industrial Recovery Act. Lone Star Cement Corporation is at the present time a member of the Institute (Resp. Ex. 2173 B; Tr. 34567).

Accurate freight rate information has always been necessary to Lone Star in the operation of its business. Prior to the time that Institute freight rate books were published, Lone Star used freight rate books which it compiled and kept up to date itself for each of its mills. When the Institute freight rate books were published, the Lone Star companies subscribed for them because they supplied accurate freight rate information in convenient form at less than the cost to Lone Star of maintaining its own rate books. Lone Star has saved over $30,000 a year by using the Institute rate books instead of compiling its own (Resp. Exs. 2374-76; Tr. 33093-107; 33118-34; 34674-80).

Lone Star uses Cement Institute freight rate books in connection with the pricing and shipping of its cement and has found them adequate for both of those uses. Witnesses for Lone Star testified, and produced documentary evidence to show that the company has never had any understanding or agreement with any of its competitors with regard to the

use or manner of use either of its own rate books or those of the Institute. Lone Star does not use erroneous or incorrect freight rates under any circumstances and in the case of rate changes, does not wait to use the new rates until they are disseminated by the Institute freight rate bureaus (Tr. 32772-73; 33095-98; 33105; 33134-38; 34677-80).

Witnesses for Lone Star testified that The Cement Institute has never influenced or attempted to influence any of Lone Star's prices, marketing policies or practices nor has it ever interpreted or attempted to interpret any of Lone Star's policies or practices, and documentary proof was offered in support of such testimony (Tr. 32738; 33074-75; 33153-54; Com. Ex. 1112; Resp. Ex. 21).

6. Exception is taken to the failure to report the evidence concerning Lone Star's practices in submitting bids to state and federal agencies which is as follows:

It has always been Lone Star's general policy in bidding on invitations of State and Federal governmental agencies to quote its regular commercial prices at the destinations called for in the invitations. Lone Star has on occasion deviated from this general policy and has quoted prices which were lower than its regular commercial prices, but although it was low bidder on several such occasions, it received no award (Tr. 32773-74; 32782-90; Com. Ex. 1112, p. 7; Resp. Ex. 21, p. 33).

When agencies of the Federal government have invited bids f.o.b. mill, it has always been the policy of Lone Star to quote f.o.b. mill prices. In the late 1920's and early 1930's, Lone Star's practice was to quote the price base at its mill as its f.o.b. mill price without regard to the destination at which the government desired to take delivery. The government, however, always made its awards on the basis of the lowest cost to it at the point of use, and Lone Star found it received no business when it bid without reference to the transportation cost involved in moving the cement to destination. Therefore, Lone Star changed to a method of bidding f.o.b. mill which would enable it to be competitive with the lowest probable cost delivered to the government at destination and has used this method since (Tr. 3527; 3529; 3530-31; 3532-33; 32663-65; 32669-740; 32746; 32775-90;

Resp. Exs. 21, p. 33; 2349-51; Com. Exs. 187 A; 188 A; 787; 789; 792; 1112, p. 7). In addition, from time to time since the NRA Code period, Lone Star has used the so-called "control clause" whereby the government was sold at a price f.o.b. mill for shipment on government bill of lading and was thereby enabled to obtain the benefit of land grant rates. Lone Star learned of the "control clause" when one company filed it with the Code Authority pursuant to the open price filing provisions of the NRA Cement Code (Tr. 32675; 32721; 32724-35).

7. Exception is taken to the implication that all of the bids of Lone Star were identical with bids of competitors, and to the failure to report that Lone Star submitted the following bids that were not identical with those of other bidders: April 10, 1925 (Com. Exs. 765 D-F); Feb. 25, 1927 (Com. Ex. 766 B); March 17, 1927 (Resp. Exs. 2349 A-Z10); April 21, 1927 (Resp. Exs. 2350 A-P); Oct. 18, 1927 (Resp. Exs. 2351 A-Z1); June 12, 1928 (Resp. Ex. 834; Com. Exs. 182 A; 183 D, G-H); July 26, 1928 (Com. Ex. 769); Dec. 17, 1928 (Com. Ex. 772); June 3, 1929 (Com. Ex. 771); August 19, 1929 (Com. Ex. 2451); June 20, 1930 (Com. Exs. 777 A-B); Jan. 20, 1931 (Com. Ex. 2439); Feb. 4, 1931 (Com. Ex. 780); Feb. 5, 1931 (Resp. Exs. 990, 993); March 5, 1931 (Com. Ex. 2440); March 13, 1931 (Com. Ex. 1875); March 20, 1931 (Com. Ex. 1910); June 11, 1931 (Com. Ex. 783); Oct. 10, 1931 (Com. Ex. 2441); Jan. 6, 1932 (Com. Ex. 1884); Jan. 21, 1932 (Com. Ex. 1863); Feb. 3, 1932 (Com. Ex. 1886); Aug. 25, 1933 (Com. Ex. 789); Sept. 20, 1933 (Resp. Exs. 1073-74; Com. Ex. 790); June 21, 1937 (Com. Exs. 121 C; 122); Sept. 23, 1937 (Com. Exs. 176 A-B); July 15, 1938 (Resp. Ex. 3006); and May 12, 1939 (Resp. Ex. 3168 C).

8. Exception is taken to the statements and implications in the report that Lone Star refused or declined to quote or sell f.o.b. mill to the government and to the failure to report that the evidence shows the following f.o.b. mill bids submitted by Lone Star to governmental agencies upon their request for such bids: April 10, 1925 (Com. Exs. 765 D-F); Feb. 25, 1927 (Com. Ex. 766 B; Tr. 3508-12); March 17, 1927 (Resp. Exs. 2349 A-Z10; Tr. 32671-722); April 21, 1927 (Resp. Exs. 2350 A-P; Tr. 32671-722); Oct. 18, 1927

(Resp. Exs. 2351 A-Z1; Tr. 32671-722); June 12, 1928 (Com. Exs. 182 A; 183 D, G-H); July 26, 1928 (Com. Ex. 769); Dec. 17, 1928 (Com. Ex. 772); March 22, 1929 (Com. Ex. 1899 B); June 3, 1929 (Com. Ex. 771; Tr. 3517); Nov. 19, 1929 (Com. Ex. 1876); April 17, 1930 (Com. Ex. 773; Tr. 3518); June 16, 1930 (Com. Exs. 185 A; 186 B; 776; Tr. 3519-22); June 19, 1930 (Com. Ex. 775); June 20, 1930 (Com. Exs. 777 A-B; Tr. 3522-23); Aug. 1, 1930 (Com. Ex. 778); Oct. 28, 1930 (Com. Ex. 779); Feb. 4, 1931 (Com. Ex. 780); Feb. 10, 1931 (Com. Ex. 781; Tr. 3524-25); March 13, 1931 (Com. Ex. 1875); April 16, 1931 (Com. Ex. 1098; Resp. Ex. 817); June 11, 1931 (Tr. 3527); Dec. 17, 1931 (Com. Ex. 1864); Jan. 6, 1932 (Com. Ex. 1884); Jan. 21, 1932 (Com. Ex. 1863); Feb. 3, 1932 (Com. Ex. 1886); April 11, 1932 (Com. Ex. 787; Tr. 3528-29); Nov. 9, 1932 (Com. Exs. 187 A; 188 A); June 6, 1933 (Com. Ex. 1099 C); August 25, 1933 (Com. Ex. 789; Tr. 3530); Sept. 20, 1933 (Com. Ex. 790; Resp. Exs. 1073-74; Tr. 3530-31); March 19, 1934 (Com. Exs. 396-97); April 3, 1934 (Com. Ex. 792; Tr. 3532-33); June 4, 1934 (Com. Ex. 193); June 26, 1934 (Com. Exs. 1099 D-G); May 10, 1935 (Com. Exs. 1099 M-Q); Sept. 3, 1935 (Com. Exs. 171 A-B; 370); April 21, 1936 (Com. Ex. 314 Q); April 23, 1936 (Com. Ex. 175 A); May 29, 1936 (Com. Exs. 1099 R-V); July 17, 1936 (Com. Ex. 1088); July 28, 1936 (Com. Ex. 1086); Aug. 28, 1936 (Com. Ex. 1092); Sept. 4, 1936 (Com. Ex. 170 A); Sept. 22, 1936 (Com. Exs. 338 C-E; 4B-4G); Oct. 7, 1936 (Com. Ex. 1083); Oct. 30, 1936 (Com. Ex. 1084); Nov. 4, 1936 (Com. Ex. 1094); Nov. 23, 1936 (Com. Exs. 334 H-J); Dec. 14, 1936 (Com. Exs. 339 C-J); Dec. 16, 1936 (Com. Exs. 337 C-K); Jan. 27, 1937 (Com. Exs. 335 C-D, R-T); April 17, 1937 (Com. Ex. 368 B); May 18, 1937 (Com. Exs. 1099 W-AA); May 22, 1937 (Com. Ex. 366 B); June 1, 1937 (Com. Ex. 369 B); Aug. 30, 1937 (Com. Exs. 180 A-C; 181 Q); Sept. 9, 1937 (Com. Ex. 123 D); Sept. 23, 1937 (Com. Exs. 176 A-B); Oct. 1, 1937 (Com. Exs. 156-57); Jan. 10, 1938 (Com. Ex. 363 D); Jan. 24, 1938 (Com. Ex. 1055); July 15, 1938 (Resp. Ex. 3006); May 12, 1939 (Resp. Ex. 3168 C); and Aug. 8, 1939 (Resp. Ex. 804).

9. Exception is taken to the failure to report that Lone Star has always secured the land grant rate information it

uses in connection with bids to the federal government from publications of the Quartermaster General which it secures direct from the War Department, from railroads or from official tabulations of bids previously taken, and that Lone Star has always intended to give the government the full benefit of laid grant rates (Tr. 32722-24; 32728-37).

10. Exception is taken to the failure to report that witnesses on behalf of Lone Star testified that it has never had any discussions with any competitor or any understandings or agreements with any competitor in connection with its bids or the various methods it has followed in bidding to any governmental agency (Tr. 32721-22; 32737-38; 32746; 32775-82; 34663-64).

11. Exception is taken to the failure to report the following evidence regarding the pricing policies of Lone Star:

The President, the Vice-President in charge of sales and the Sales Manager testified that Lone Star has never had any understanding or agreement with any competitor that any mill should or should not be recognized as a so-called base mill, nor has it ever had any agreement or understanding with any competitor as to the prices it would quote, the method it would follow in computing prices or the manner in which it would make its quotations (Tr. 6622-23; 6627-30; 33090; 33150-52; 34663-64).

Lone Star's only source of information regarding competitors prices is its salesmen and customers, together with tabulations of bids submitted to government agencies and data published in newspapers and trade journals (Tr. 6643-45; 32748; 32771-72). It does not send to competitors or receive from them any information regarding prices (Tr. 6631; 6639; 32741; 32825; Resp. Exs. 2378 A-B).

Lone Star sells largely at destination prices because purchasers buy at the lowest laid down cost at destination and therefore prefer such prices and the delivery point is the only point where competitors prices can be met (Tr. 6173-79; 32654-55; 32660-63; 32672-74; 34575-76).

All of Lone Star's mills have always been so-called base mills and many of the prices Lone Star quotes are the equivalent of the price base figure at some one of its mills

and freight from that mill to the destination in question. At many destinations where Lone Star sells, prices of competitors are lower than Lone Star's price would be were it the equivalent of Lone Star's base figure and freight to destination. At such destinations, Lone Star meets the lowest known price quoted by any competitor (Tr. 6021; 6048; 6053-54; 6153-54; 6279-80; 32634-36; 34663). Many of its prices do not reflect a base at any mill (Tr. 6280; 6620-21). Lone Star's principal reason for making all of its mills so-called base mills has been to discourage competitors as far as possible from soliciting business and selling in the area around each of its mills in which Lone Star has a freight rate advantage and it has had that effect. For example, when Lone Star established its New Orleans mill as a base in 1927, it caused prices in the territory served by that mill to drop from 45 to 50 cents per barrel on an average and the number of competitors in the Louisiana market dwindled from about a dozen to two or three and those remaining have been less active (Tr. 32636-41; 33213-15; Resp. Exs. 2459-61).

Lone Star has initiated price increases on some occasions that its competitors have not followed, with the result that Lone Star had to withdraw the increase. Likewise competitors have initiated price increases that Lone Star has not followed (Tr. 6109; 6263-64; 6612-13; 32825-28).

It has always been the general policy of Lone Star to adhere to its openly quoted prices, but on a few occasions, Lone Star has made secret prices below its published prices. Such deviations have been occasioned by the granting of secret rebates and price concessions by competitors in such volume as to make serious inroads into Lone Star's normal sales (Tr. 32741; 32746-65; 32781-90; 32807-24; 34632-61; Resp. Exs. 2352 A-i).

12. Exception is taken to the failure to report the following evidence concerning the dealer policies of Lone Star:

Most of its sales to the Government, either state or federal, are made direct at minimum prices without the intervention of a middleman. The chief exception is the small quantity of cement which is sold by dealers to some

state agencies for maintenance purposes and to the United States Government for use on emergency relief projects. In all other cases Lone Star cement reaches the ultimate consumer either through a middleman called a "dealer" or through direct sale by Lone Star at minimum prices. Lone Star has for many years publicly announced to its trade the classes of business it would sell direct and which it would sell through a dealer (Tr. 6477-78; 33146; Resp. Ex. 21, p. 9; Com. Ex. 1112, pp. 5-6).

The policy of Lone Star with regard to its dealers was first set out in a pamphlet entitled, "Trade Ethics and Marketing Prices", which was compiled and issued in 1928 and widely distributed to its dealers, as well as to contractors and to public officials. It did not change to any extent policies previously in force, but was merely a restatement of such policies. Its primary purpose was to give to the trade and to the public a clear statement of the policies of Lone Star (Com. Ex. 1112, pp. 5-6; Resp. Ex. 21, pp. 9, 31-37; Tr. 6063-67; 6075-77; 33153-54).

In June, 1930, Lone Star was forced, because of competitive conditions, to withdraw the policy outlined in its booklet, "Trade Ethics and Marketing Policies". That policy had stated that Lone Star cement would be marketed in each community only through recognized and established building material dealers regularly servicing such community, with certain exceptions specifically set forth, *e. g.*, the United States Government, state governments and railroads. The policy was withdrawn because Lone Star's competitors were selling an increasing amount of work direct and Lone Star was losing considerable business. In announcing its discontinuance to the trade, Lone Star stated that this action did not mean an abandonment of its traditional strict dealer policy, and that it would continue to sell through dealers as much as possible, but that the company had to place itself in a position to meet competitive conditions. Lone Star thus made itself free from any obligation to customers implied in the pamphlet, to meet particular situations as they arose. By and large however, the policy enunciated in its pamphlet was followed until the NRA Code was approved by the President of the United States. (For citations see next paragraph.)

Article XI of the NRA Code represented substantially Lone Star's long standing policy with minor variations. After Article XI was suspended, Lone Star continued to sell on substantially the same basis, and in February, 1935 issued an announcement to the trade of the policy of classification it was following and intended to follow in the future. This policy was later amended in 1935, and as such has continued in force up to the present time in all of Lone Star's marketing territories, except Texas and Florida, as to which Lone Star has issued separate announcements to its dealers (Tr. 33145-46; 33262-63; Com. Exs. 557; 1112, pp. 5-6; 1165 A-Y; Resp. Exs. 21, pp. 9, 31-37; 670 A-B; 1750; 2379; 2456 A-B).

Witnesses for Lone Star testified and produced documentary proof showing, that it has never had any agreement or understanding with its competitors concerning its policy announcements or its classification of business (Tr. 33146; 33153-54; 34560; 34572-73; Com. Ex. 1112, pp. 5-6; Resp. Ex. 21, pp. 9, 31-37).

Dealers are the backbone of Lone Star's business, such sales varying from 60 per cent to 90 per cent of total shipments at its various mills. The importance of the dealer has had a tremendous influence on Lone Star's marketing policies. Many of Lone Star's practices and policies are almost wholly attributable to the importance of its dealer business, *e. g.*, its policy against diversions; the use of blanket prices in large consuming centers; the five day advance clause; the five day decline clause; and practices with regard to trucking (Com. Ex. 1112, pp. 5-6, 12, 13; Resp. Ex. 21, pp. 8-14, 31-37; Tr. 32774-75; 32828-66; 33145-54; 34560; 34572-73; see also exceptions to Paragraphs 139-146, *infra*).

Lone Star has always had its own independently conceived definition of a cement dealer, and has tried to confine its dealer sales to those who meet the company's qualifications in the belief that the efficient distribution of its cement required it (Resp. Ex. 21, pp. 9-10, 31-37; Com. Ex. 1112, pp. 5-6; Tr. 6482-83; 32828-41; 34560). Lone Star has found its competitors selling to persons whom it refuses to recognize as dealers, and it in turn has

sold to dealers to whom competitors have refused to sell (Tr. 6482-83; 32839-41; 33243-46; 34560).

Lone Star has always sold its cement subject to the condition that the buyer would not divert it in transit except with the permission of the company. A statement to this effect was made in Lone Star's pamphlet, "Trade Ethics and Marketing Policies", and this in turn represented a restatement of a policy, continuously and actively in force throughout the history of Lone Star. The reason for this policy is that diversions by a consignee may permit him to secure a lower cost than other customers of Lone Star at the point to which diversion is made, and thus bring about a discrimination to the detriment of Lone Star's regular dealers at such place (Tr. 6110-14; 32774-75; Resp. Ex. 21, p. 13; Com. Ex. 1112, p. 13).

In many large metropolitan areas, Lone Star sells its cement at what may be called a "blanket price". The "blanket" price gives dealers in competition with each other in a common sales area the same price. This permits them to compete on equal terms with each other in that area, and particularly permits Lone Star dealers to compete on an equal price basis with dealers handling cement of competitors. Lone Star has initiated such blanket prices at certain points, *e. g.*, Dallas and Houston, Texas, New Orleans, Louisiana, and Norfolk, Virginia and has found such prices initiated by competitors at other places, *e. g.*, Birmingham, Ala.; New York City; Boston, Mass.; Chicago, Ill.; St. Louis and Kansas City, Mo. Where others have established such prices Lone Star has had to meet them in order to sell cement. Witnesses for Lone Star testified that such prices have been initiated or met by Lone Star without any agreement or understanding with competitors (Tr. 33150; Com. Ex. 1112, p. 7).

13. Exception is further taken to the failure to report the following evidence concerning Lone Star's terms and discounts:

In case of an advance in price, Lone Star has always followed the policy of issuing quotations to its dealers effective five days from the date of notice, and during this five day period Lone Star permits dealers to purchase their

warehouse requirements for an average 10 day period as well as their requirements to fulfill specific job contracts already entered into. It has consistently safeguarded information with respect to proposed price changes so as to prevent premature publicity in advance of regular quotation, in order to insure the same treatment to all customers. The five day notice of a price advance serves the purpose of preventing competitor's salesmen from obtaining orders from customers on representations, in many cases false, that the market was going to advance. Lone Star, by the use of the five day notice, assures the dealer of a five day period during which he may place orders with Lone Star at the old price (Com. Ex. 1142, pp. 8, 12; Resp. Ex. 21, pp. 8-9, 10-12; Tr. 33151-52).

In the case of a decline in price, prior to the NRA Code, Lone Star followed the policy of making all quotations of a decline in price effective as of the date of notice, except that the reduction applied on all shipments in transit. Under the NRA Code, the period of protection against price decline extended to the dealer was fixed at five days. After the NRA was declared unconstitutional, Lone Star continued to use the five day notice of a decline in price, since it found that the substitution of a fixed five day period for the indeterminate period while shipments were in transit, operated to eliminate disputes and friction with dealers found to exist under Lone Star's previous policy (Com. Exs. 557; 1142, p. 12; Resp. Ex. 21, p. 10; Tr. 33152).

Witnesses on behalf of Lone Star testified that its terms of sale and discount have never been the subject of agreement or understanding with any competitors (Tr. 33146-50; 34560). Necessarily, however, Lone Star is unable to sell its cement unless it makes its terms as liberal as those of its competitors. As a result, terms and conditions of sale have become substantially uniform in each particular market, and the tendency has been for the discount terms and other sales conditions to become more and more favorable to the buyers of cement (Tr. 6567-68).

Prior to 1926, Lone Star had only one discount—10 cents for cash in 10 days. In 1926, it followed the lead of a competitor in giving a 10 cent trade discount to dealers and

extending the period for the cash discount to 15 days. Lone Star's Texas subsidiary initiated the 10 cent trade discount in Texas but its principal competitor, Trinity, did not follow it. In 1929 Lone Star discontinued the 10 cent trade discount because dealers were passing it on to the ultimate consumer and Lone Star was getting no advantage from its use. Competitors did not follow Lone Star in discontinuing the trade discount. However the necessity for meeting their competition forced Lone Star to restore its trade discount about a month later. In November, 1930, when Lehigh announced its 5 cents per barrel delayed payment plan Lone Star sounded out its dealer customers and found they were opposed to it. Accordingly, Lone Star did not adopt the plan. In the spring of 1931, when the Lehigh 5 cent plans was withdrawn, Lone Star again discontinued the trade discount to its dealers and has had none since but retained its 10 cents dealer discount (Com. Ex. 1112, p. 8; Resp. Ex. 21, pp. 8-9; Tr. 33147-50).

Lone Star has used substantially the same forms of contract for the past 15 years. Executives of the company testified that none of the provisions in its contracts are the result of agreement or understanding with any competitors, nor has any provision resulted from any suggestion or recommendation of The Cement Institute (Tr. 33074-75; 33188-89; Resp. Exs. 2358 A-o):

14. Exception is taken to the implication that the references cited constitute a fair review of the evidence regarding the trucking policies of Lone Star, and to the failure to report the following evidence regarding Lone Star's trucking policies:

Trucking of cement was not a serious factor at any of Lone Star's mills until 1930, when the volume of trucking began to increase. Until that time, at Lone Star mills where trucking was permitted, dealers and other customers obtained their cement at a mill price without any restriction or extra charge. Gradually, however, as trucking increased, mechanical difficulties at the mills, which were primarily equipped for railroad shipment, and friction with its dealer customers who did not truck caused Lone Star to reappraise its practice with the result that at different times

at different mills it finally discontinued trucking entirely at all of its mills (Tr. 34669-71). Lone Star found that much of the cement trucked from its mills was taken by the customer to a town where he had no place of business or warehouse and sold there at a lower price than the price at which Lone Star's regular dealer at that point was selling cement. The invasion of markets of established dealers by those who trucked cement led to a growing protest by dealers for restrictions upon and the discontinuance of trucking. As the friction with its dealers increased, Lone Star concluded that trucking was not a desirable method of serving its customers (Tr. 32858-66; 34669-71).

In addition to the difficulties at the mill and the friction with dealers, there was another consideration which entered into the discontinuance of trucking by Lone Star. Lone Star's dealer distributing policy was based on the fact that dealers carry an adequate stock of cement and have the necessary equipment available at all times for prompt service to the ultimate consumer. Lone Star found that dealers who trucked cement often tried to get by without an adequate warehouse stock, coming to the mill for a truckload whenever they had an order. This reduced the sale of Lone Star cement, since frequently the dealer was not able to fill a customer's order promptly and the latter either bought from another dealer, or a different brand, or used some other material (Tr. 34669-71).

Executives of the company testified that all of Lone Star's practices and policies with regard to trucking have been the result of its own independent decision and action, without any agreement or understanding with competitors, with dealer associations or with railroads (Tr. 32866; 33141; 34551-56; 34671).

The policy of Lone Star with regard to deliveries of cement to trucks at its mills has varied from mill to mill and from time to time, depending on the demand for such deliveries and upon local competitive conditions. The history of truck deliveries at each of Lone Star's mills has been as follows:

At the Dallas mill, Lone Star contracted with trucking companies to make deliveries by truck paying the actual

cost of such deliveries. It did this until about 1932, when Texas enacted a law limiting the size of truckloads, which made such deliveries too expensive. It also made deliveries to customers' trucks at the mill, charging its price base as an f.o.b. mill price. Such deliveries were discontinued on or about March 1, 1926 because of increased loading and bookkeeping expenses occasioned thereby and because of dealer dissatisfaction. No surcharge was ever made for deliveries at the mill (Tr. 32841-46; 32852; 33141-42; Com. Exs. 976-13W, 13Y).

At the Houston mill, trucking, both by hired trucks and by customers' trucks, was permitted until about 1929, when it was discontinued at the request of Houston dealers. No surcharge was ever made for deliveries to customers' trucks at the mill (Tr. 32846-52; 33141-42; Com. Exs. 976 B, D).

At New Orleans, deliveries to customers' trucks at the mill was permitted from the beginning of operations in 1927, but there was never any demand for it. No surcharge was ever made for deliveries to customers' trucks at the mill (Resp. Ex. 2356; Tr. 32852-55; 33141-42; Com. Exs. 975-5N, 5P).

No deliveries were ever made to trucks at Lone Star's Spocari and Birmingham, Alabama, mills (Tr. 32856; 33141-42; Com. Exs. 975-4Y-4Z).

At Norfolk, deliveries were made to customers' trucks at the mill from some time until August 1932, when trucking was discontinued because of lack of demand and the expense and inconvenience of loading. All during this period the price was Lone Star's Norfolk delivered price (Tr. 32856-57; 33140-42; Com. Exs. 970-2E, 2G).

At Nazareth, there was never any large demand for deliveries to trucks, but nevertheless Lone Star made deliveries to customers' trucks at that mill from 1928, when it was acquired, until August, 1932, when Lone Star discontinued the practice after repeated dealer complaints. Prior to October 1929, sales were made at the mill at the price base; from October 1929 to August 1932, a surcharge of 15 cents per barrel was made to customers taking delivery at the mill (Tr. 32857-58; 33140-42; Com. Exs. 969-3C, 3E).

At Hudson, Lone Star made deliveries to customers' trucks at the mill from at least 1924 until August 1932, when the company discontinued the practice. Prior to June 1930, sales were made at the mill at the price base; and from June 1930 to August 1932, at a surcharge of 15 cents per barrel (Tr. 32857-58; 33140-42; 34669-70; Com. Exs. 969-3T, 3V).

At Limedale, deliveries were made to customers' trucks at the mill from the beginning of operations until October, 1932, when the practice was discontinued in order to preserve dealer outlets. During this period, sales were made at the mill either at the price base or at Lone Star's destination price with freight allowed. No surcharge was ever made (Tr. 32857-58; 33140-42; Com. Exs. 975-17R, 17T).

At Bonner Springs, there was never more than a small demand for deliveries to trucks, but Lone Star made such deliveries on request from 1923 until March, 1933, when it discontinued the practice in order to keep the good will of its dealer trade. From 1923 until 1925, sales at the mill were made at the price base; from 1925 to about July, 1932, sales were made at the company's destination price with full rail freight allowed; and from July, 1932 to March, 1933, a surcharge of 15 cents per barrel was made (Tr. 32857-58; 33140-42; Com. Exs. 967-16K-16M).

In 1928 Lone Star built a silo in Washington, D. C., especially equipped to make deliveries to trucks. The cement was shipped in bulk by water from Lone Star's Norfolk mill. Almost all deliveries from this silo are to customers' trucks. Lone Star's purpose was to obtain a competitive advantage by these facilities. Competitors, however, built or leased warehouses for their own use, but closer to the center of the city than Lone Star's silo. Lone Star was thus immediately put at a competitive disadvantage. To meet the resulting disadvantage in location, Lone Star leased another warehouse located more closely to the center of the city. The net result of Lone Star's action in establishing warehouses in Washington was to reduce the price in Washington and contiguous areas by about thirty cents per barrel on the average, to increase Lone Star's business in the Washington market to some extent, and to force out some competitors entirely (Resp. Ex. 2357 for id.; Tr.

6297-301; 25999-6001; 26378; 26865-68; 31140-47; 32866-84; 34631).

15. Exception is taken to any implication by reference to "meetings" that Lone Star participated in any improper or unlawful meeting or that it became a party to any understanding or agreement with respect to any matters at issue on the ground that they are not supported by the evidence. Exception is specifically taken further to the failure to report the following evidence with respect to Com. Ex. 1131 J:

Com. Ex. 1131 J concerns a conference in December, 1930 called by Hon. R. P. Lamont, Secretary of Commerce to see what the Department of Commerce could do to bolster up the distressed conditions that had developed in the cement industry. Lone Star had no knowledge of the conference prior to receiving an invitation to attend, nor of its purpose until its representative arrived. When he arrived the Lone Star representative found that representatives of several other cement companies were in attendance. Nothing at all was accomplished (Tr. 33149-50; 34556-60).

16. Exception is taken further to the failure to report the following evidence regarding Com. Exs. 580 A-B which is cited with respect to "meetings":

C. L. Hogan, who was present at the July 1929 meeting referred to in Com. Exs. 580 A-B, was a member of a committee that had been formed in June of 1929 to take care of the preliminary work of organizing a trade association. He testified that, as such, he participated in some conferences of the Committee and its counsel in June, July and August of 1929 of which the meeting referred to in Com. Exs. 580 A-B was one (Tr. 34560-61). The appointment of this Committee was the direct result of a speech made by W. E. Humphrey, then a member of the Federal Trade Commission, at a meeting of the Portland Cement Association in May, 1929. In his speech, Mr. Humphrey encouraged the cement manufacturers to form a trade association and to draft a set of rules and methods of doing business for the basis of a Trade Practice Conference with the F.T.C. B. S. Smith, in whose office the conference referred to in Com.

Exs. 580 A-B was held, was chairman of the Committee referred to. R. Hulsart was also a member of the Committee. McAllister and Lamb were counsel for the Committee and were employed from the outset to guide its work in organizing the trade association and in formulating a tentative set of trade practice rules for presentation to the F.T.C. for its approval at a Trade Practice Conference (Tr. 34561-64).

17. Exception is taken to the failure to report, in connection with the citation of Resp. Ex. 1469 A and Com. Ex. 286 J in Paragraph 36, the following evidence regarding Lone Star's efforts to compete with foreign cement:

Lone Star meets the competition of foreign imported cement encountered sometimes regularly and at other times sporadically at all of the principal Atlantic and Gulf ports. Foreign cement is offered at prices much lower than the price of domestic cement and Lone Star has taken various kinds of action to meet that competition. It has established "special" or "arbitrary" low prices at various seaboard centers, or met such prices established by competitors. Such prices have been largely ineffective to drive out the foreign imported cement, since those selling the foreign cement, however, have always been able to underquote every reduced price instituted by a domestic manufacturer (Tr. 6529-35; 32891-95; see also exceptions to Paragraphs 151, 156, 157 and 158, *infra*).

Lone Star was one of the companies which established a stock of cement in Brooklyn to sell at low truck prices in order to compete with foreign cement (See exceptions to Paragraphs 155 and 156, *infra*). Executives of the company explained Lone Star's attitude on this matter fully and testified that this was done without agreement or understanding with competitors (Tr. 33075-81).

Lone Star instituted the policy of refusing to sell to any dealer who handled foreign cement in November, 1926. Lone Star's enforcement of this policy was spasmodic, depending upon the acuteness of the competitive situation at any particular time and place. The policy was enforced as to specific dealers in Boston in 1927, in Tampa, Florida, in the same year, and at New Orleans in 1929, and again in

New York and Boston in 1933. Some domestic competitors also adopted the policy but others continued to sell freely to dealers who handled foreign cement. Executives of Lone Star testified that Lone Star has never had any agreement or understanding with its competitors as to the adoption or enforcement of this policy (Tr. 6549-60; 6567-75; 23858-59; 26956-57; 27451; 32892-907; 33031-56; see also exceptions to Paragraphs 152, 153 and 154, *infra*). Documentary evidence showing this was rejected by the Examiner (Resp. Exs. 2359 for id.; 2364-71 for id.).

Paragraph 37

(Keystone)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Keystone Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Keystone is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication that the acts and practices of Keystone were adopted or used pursuant to agreement or understanding with any respondent on the ground that it is not supported by the evidence; further exception is taken to the failure to report that the president of Keystone appeared as a witness and testified fully regarding the independent adoption and uses of the practices and policies of the company; and that this testimony was directed to the charges in the complaint as well as to the

evidence offered by Commission's counsel affecting Keystone and included all subjects referred to in Paragraph 37 of the Report (Tr. 27330-666).

4. Exception is taken to the failure to report the following evidence regarding the location and operation of the Keystone plant:

When Keystone was organized in 1926 the demand for cement was very large in the northeastern states (Tr. 27333-34; 27346). Keystone's plant was built at Bath, Pa., in the Lehigh Valley because of the availability of a quarry of fine quality stone sufficient for fifty years' operation and the existence of excellent rail transportation facilities to nearby large eastern markets (Tr. 27345-46). The present annual capacity of the plant is 2,500,000 barrels (Tr. 27380).

Keystone normally markets its cement throughout the northeastern states, including the District of Columbia (Tr. 27423-24). Keystone's mill is virtually surrounded by mills of competitors in the Lehigh Valley. It could not exist on sales merely in the area where its freight rates are equal to or lower than those of competitors and seeks volume required for efficient operation by selling at points outside that area (Resp. Ex. 1417; Tr. 27584; Com. Ex. 1).

5. Exception is taken to the failure to report the evidence showing the following with respect to the pricing practices and policies of Keystone:

Keystone is a price follower. All of its customers buy on the basis of the price laid down at destination and request prices at the point of use (Tr. 27562-63). Therefore, Keystone endeavors to meet the lowest prices quoted by any competitor at each market where it sells. It learns of competitors' prices throughout its selling area from its customers and not from competitors (Tr. 27445; 27495). It finds many prices which appear to reflect a pattern of base plus freight and many that do not. In either case it meets the lowest it finds (Tr. 27448; 27450). It keeps a current record of its prices at each destination where it sells in readily available card files and uses this record for

quoting prices (Tr. 27495-96; 27511). When on analysis, however, bases are reflected in delivered prices, Keystone records these bases and uses them if occasion to quote a price arises at a destination for which Keystone has no other price information and has reason to believe from past experience in the area involved that its price so determined will be competitive (Tr. 27496; 27518-19).

Keystone has never received lists of basing points from competitors or from The Cement Institute, nor has Keystone given its list of basing points to competitors (Tr. 27518-19).

6. Exception is taken to the failure to report the following evidence regarding Keystone's bids to federal and state agencies:

Keystone has never received requests for f.o.b. mill prices from commercial customers or state purchasing agents (Tr. 27562-63). Documentary records to this effect were rejected by the Examiner (Resp. Exs. 1402-14 for id.; Tr. 27566-67).

Keystone's prices on the lettings referred to in Commission's Exhibits 372 A, 303 D and 1099 W (cited in Paragraph 37) were its current commercial prices at the destinations involved, and in some instances Keystone's prices were lower than prices quoted by other bidders (Resp. Exs. 783; 1316 A; 3164 A; Tr. 24042; 28044-45; Resp. Exs. 763-64; 766-67; 774; 3715; Com. Exs. 1166; 551-o-V-X-2C).

The letting referred to in Com. Ex. 1099 M (cited in Paragraph 37), occurred during open price filing under the NRA Code and Keystone's prices were its current commercial prices then on file with the Code Authority (Com. Exs. 557; 409 I. R; Resp. Exs. 763-64; 766; 767; 774).

The Examiner rejected contemporary records of the company showing its practice in preparing its bids to the United States Government (Resp. Exs. 1400 id.; 1401 id.; Tr. 27545-50).

Prior to April, 1938, it was the custom in federal government agencies to invite Keystone to bid f.o.b. destination except that one or two departments had requested alternate bids; that is, bids either f.o.b. destination or f.o.b. mill.

In April and May, 1938, Keystone received invitations from the Procurement Division to bid f.o.b. mill prices for large quantities of cement. The first of these inquiries was so different in form from anything Keystone had previously received from the government that the president of the company submitted the inquiry to Keystone's Board of Directors for a decision as to whether or not Keystone should bid. The directors decided that Keystone should not submit a bid for the following reasons, among others: the invitation called for an unlimited quantity with no guarantee that, if granted an award, Keystone would actually ship any cement; the proposed contract provided that Keystone might be required to ship cement to projects receiving federal aid for which Keystone had already sold cement or would ordinarily sell cement through commercial buyers; and bids were requested f.o.b. mill with no opportunity provided for Keystone to meet competition at destinations where the cement would be used, even though awards were to be made on the basis of the laid down cost at point of use (Tr. 27577-83; Resp. Exs. 1416; 1417; Com. Ex. 1339). For similar reasons Keystone did not bid in response to two other Procurement Division invitations in April and May, 1938 (Tr. 27591).

Keystone has never shipped cement into territory where land grant rates were available to the government and never used the "control clause" (Tr. 27483-85).

7. Exception is taken to the failure to report the following evidence with respect to Keystone's membership in The Cement Institute:

Keystone joined The Cement Institute in June, 1933, because the management believed that under NRA it was advisable for every manufacturer to join a trade association (Tr. 27388-89; Resp. Exs. 1366-68).

Keystone has never had a traffic department. By using the Institute freight rate books Keystone has eliminated the expense of maintaining its own traffic department to compile freight rates (Tr. 27482-83; 27477-79). Prior to its use of the Institute rate books Keystone subscribed for rate books furnished by the National Freight Rate Bureau,

and the Nazareth Traffic Bureau (Resp. Ex. 1354; Tr. 27555-56; Resp. Exs. 1374-77).

Keystone uses the Institute statistical service together with other statistics, including those issued by the Bureau of Mines, to estimate its operating plans (Tr. 27416), as well as to stimulate better performance by its sales department through comparison of Keystone's shipments with those of competitors (Tr. 27404-05). The evidence shows that Keystone has had no agreement with any competitor regarding the use of those statistics (Tr. 27405; 27406; 27416) and that it has not been a party to any allocation of business with competitors (Tr. 27394-95). In almost every year, during the last eight or nine years, Keystone has increased its percentage of the total volume of shipments made by companies in Districts 1 and 2 (Tr. 27407).

Keystone continued its membership in The Cement Institute after the NRA because of the value to it of the Institute freight rate and statistical services (Tr. 27558-60).

8. Exception is taken to the implication in Paragraph 37 that Keystone was shown by the evidence to have attended any meetings other than duly constituted meetings of The Cement Institute and the Portland Cement Association. Com. Exs. 1965 A-B, cited in support of the implication does not relate to Keystone and there is no other evidence to support it.

9. Exception is taken to the failure to report the following evidence with respect to Keystone's dealer policies:

The major portion of Keystone shipments are distributed through some 800 building material dealers (Tr. 27489-90). Keystone's dealers provide a steady demand for cement and perform many services to consumers which tend to promote the sale of Keystone cement (Tr. 27486-88; 27489).

Keystone independently determines whether or not a particular person is desirable as a dealer for its cement. Membership in a dealer association has never been a prerequisite (Tr. 27491-92). Keystone has never been influenced by competitors or by The Cement Institute in the selection of its dealers (Tr. 27490-92).

The evidence shows that Keystone has never made any division of its customers into classes for direct and dealer sales except independently in accordance with the necessities of competition, and the evidence shows that Keystone has never had any understanding with any competitor regarding such division (Tr. 27493-94).

10. Exception is further taken to the failure to report the following evidence regarding Keystone's efforts to meet the competition of foreign cement:

Keystone has long regarded dealers who handle foreign cement as competitors and from 1933 to 1935 refused to sell cement to such dealers. This policy was independently adopted by Keystone after certain competitors advised the trade of a similar policy. Keystone abandoned the policy because other competitors continued to sell to dealers handling foreign cement and thereby caused Keystone's policy to be ineffective (Tr. 27450-52; 27458).

The evidence shows that Keystone never had any understanding with competitors regarding its adoption, use or discontinuance of this policy, and that The Cement Institute had nothing to do with it (Tr. 27452; 27461).

In 1935 Keystone learned from information broadcast to the trade, of the establishment by some of its competitors of cement stocks at points along the Brooklyn waterfront in order to meet foreign competition at the place of entry. Keystone attempted to meet this competition by doing likewise during the few months it existed (Tr. 27463-72; Com. Exs. 210 G, H; Resp. Exs. 1372-73).

It has been necessary for Keystone to meet the various competitive conditions existing in seaboard markets, including depressed prices because these markets have been Keystone's most important markets and abandonment of them has been out of the question (Tr. 27447-49).

The evidence shows that Keystone has never had any understanding or agreement with any respondent regarding its prices or policies adopted and used to compete with foreign cement (Tr. 27473; 27449).

11. Exception is taken to the failure to report any of the evidence showing Keystone's policies and practices

with respect to truck deliveries. This evidence shows the following:

Keystone loaded trucks at its mill for a few years only in order to meet competition (Tr. 27359; 27355-56). During this period, sales to trucks were very small in proportion to Keystone's total volume of sales (Tr. 27356-58; Resp. Ex. 1356). The layout of the Keystone plant caused loading of trucks to interfere with carload packing operations. This interference promoted labor difficulties on the part of packers who worked on a barrel basis and the operation was generally unsatisfactory (Tr. 27354-56; 27360). Therefore, in the summer of 1932 when various competitors announced to customers that they would no longer make deliveries to trucks, Keystone likewise discontinued such deliveries except on cement for which contracts had previously been entered (Tr. 27362; Resp. Exs. 1357-60; 1365).

Keystone was never interviewed by any railroad representatives regarding trucking, nor did it have any agreement or understanding with competitors, railroad officials, or dealer associations regarding its elimination of trucking. The Cement Institute never had anything to do with Keystone's policy regarding the loading of trucks (Tr. 27376-77).

13. Exception is taken to the failure to report that water transportation is not available on shipments moving from the Keystone mill (Tr. 27377-78).

Paragraph 38

(Kosmos)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Kosmos Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such

implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Kosmos is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 38 that the acts or practices of the Kosmos were adopted or used pursuant to agreement or understanding and to the failure to report that the president of Kosmos appeared as a witness and testified fully regarding the company's policies and practices at issue and showed that they were adopted and used independently and without agreement or understanding with any other respondent (Tr. 36800-37079; 12400-53).

4. Exception is taken to the failure to report the following evidence regarding the Kosmos Company generally:

Kosmos is a small company with a single modern and efficient mill of 1,175 barrels (Tr. 12400; 36803-04; Com. Exs. 3205 A-E). It is not connected by common directors or officers with any other cement company (Tr. 36804).

Kosmos markets cement in southern Indiana and northern Tennessee, southwestern Ohio, western West Virginia and all of Kentucky (Tr. 36804-05). Before 1920 Kosmos sold throughout the deep south, but new mills and reductions in price drove it from this area (Tr. 36842-43; 36858).

The evidence shows that Kosmos has not had any agreement to restrict production or volume of shipments to 70% or any other figure (Tr. 36834-35; 36977). In 1930 Kosmos produced and shipped 77% of its mill's capacity (Tr. 36977; Com. Ex. 2895 B).

5. Exception is taken to the failure to report that the evidence shows the following regarding pricing by Kosmos:

Kosmos usually sells at delivered prices because purchasers are interested in the price of cement at the point

use and most of its customers have asked for destination prices (Tr. 36812-13; 36884-85; 36879).

This has been true since at least 1908 (Tr. 36878-79). Kosmos has had no agreement to sell only at delivered prices (Tr. 36892), and in fact has quoted and made f.o.b. mill sales (Resp. Exs. 2758 A, B, U, Z; Com. Ex. 129; Tr. 36813; 36932-33; 36942-47).

Since at least 1908 Kosmos has determined its prices in the same way—*i. e.*, it is interested only in meeting or beating the delivered prices it finds in each market and it continually checks with its customers at the destinations where it sells to keep abreast of prices quoted by competitors. It never sends price information to competitors, nor does it receive such information from them (Tr. 36877-78; 37040; 12410; 12436-37; 36806-09; 36924; Resp. Ex. 2755; Tr. 36921; 36924).

Kosmos has at times assumed price leadership and at other times has merely met the prices it finds (Tr. 12405-06; 12410; 12436-37).

Kosmos has quoted prices reflecting a base at its mill since 1932. Prior to that time it was unable to use a base at Kosmosdale because existing prices were so low, a base would have been ineffective unless it were so low as to be beyond reason (Tr. 12438; Resp. Ex. 2748). It tries to realize its full net on all sales, but cannot do so because it must reduce its delivered prices sufficiently to meet the lowest price in any market (Tr. 12438-39; 36808). Kosmos has also sold at prices lower than the sum of its base plus freight; it quotes secret lower prices from time to time and finds competitors doing likewise (Tr. 12404; 36817-18; 36853; 36808; 36859-60; 12442-43).

The evidence shows Kosmos has had no agreement regarding prices and that the Institute has not attempted to influence Kosmos' prices (Tr. 36897; 36899).

Kosmos does not consider its mill net to be its price. Price is what the buyer pays for the cement delivered to destination (Tr. 36851-52). Since Kosmos was organized in 1905, when purchasers have paid the freight it has been for the account of Kosmos (Resp. Exs. 2751 B; 2752; Tr. 36951). Kosmos has always made good for any loss or damage in transit (Tr. 36952; Resp. Exs. 2749 B, 2750 B).

6. Exception is taken to the failure to report the following evidence regarding bidding by Kosmos:

Kosmos usually bids its current commercial prices on all federal and state government work (Tr. 36814-15). It has sold to the State of Kentucky at special low prices (Tr. 12446).

Kosmos has submitted f.o.b. mill bids (Com. Exs. 766; 772; 769; 1899; 771; 773; 776; 184 R; 185; 777; 778; 779; 780; 1875; 783; 785; 129; 1884; 1886; 788; 790; 1091; 1899; 1888; 1890; 2761; Tr. 36945; Resp. Exs. 2350 P; 1064; 864; 990; 1001; 1009; 1011; 2705; 1074; 2758) and has bid prices which were not identical with the prices of competitors (Com. Exs. 769; 772; 773; 776; 778; 779; 184; 185; 129; 791; 1875; Resp. Ex. 864).

7. Exception is taken to the failure to report the evidence showing the following regarding truck delivery by Kosmos:

Truck delivery of cement caused complaints by Kosmos' dealer customers (Tr. 36954-55). There was so little volume of it, that Kosmos discontinued it at its mill except as an accommodation to a good customer (Tr. 36955; 37070-71).

Kosmos does, however, permit some trucking from its mill (Tr. 36954-55). Also, it allows dealers to come to its Cincinnati warehouse and take truck delivery (Tr. 37071).

Kosmos did not attend any meeting at which it was agreed to discontinue trucking and had no agreement to discontinue trucking (Tr. 36957).

Kosmos never had a 15-cent charge for loading trucks (Tr. 36957).

8. Exception is taken to the failure to report the evidence showing the following with respect to the policies of Kosmos concerning direct and dealer sales:

The company's distribution practices have evolved gradually from early times when Kosmos sold its cement in the far South through distributors (Tr. 36877-79; 32652-53; 36818-19). Today the dealer is Kosmos' most important outlet for cement; about 80% of Kosmos' shipments are to dealers (Tr. 36818; Resp. Ex. 2757-A).

The company sells to dealers when dealer service is required by the ultimate consumer. Its choice of dealers depends on local circumstances. It has had no agreement regarding its selection of dealers (Tr. 36818-19; 36962-63; 36961).

In February and April 1935 Kosmos published announcements of its dealer policy in response to the demand of its trade and in order to meet competitive announcements. These policies were adopted and announced without discussion or agreement with any competitors or dealers (Tr. 36964-65; 36820; see also Tr. 36819-20).

Kosmos has sold direct on WPA business (Tr. 36967-68). Further evidence on this subject was excluded by the Examiner (Resp. Ex. 2757 B for id.).

9. Exception is taken to the failure to report the testimony that Kosmos has not had any agreement to prevent purchasers from diverting shipments in transit or to use a no-diversion stamp on a bill of lading (Tr. 36953).

10. Exception is taken to the failure to report the evidence showing that Kosmos does not come in contact with imported cement and that it has had no agreement with reference to imported cement (Tr. 36995).

11. Exception is taken to the failure to report the following evidence regarding Kosmos' membership in The Cement Institute:

Kosmos joined The Cement Institute in June 1933 in order to participate in the deliberations which resulted in the NRA Cement Code (Tr. 36974; Resp. Exs. 2770; 2771). The Institute never dictated prices to Kosmos (Tr. 36897) and it has never been a formulator of prices or pricing and marketing policies as far as Kosmos was concerned. Institute meetings have not been the subject of any agreement on price or sales policy (Tr. 36976).

Kosmos has used Institute statistics as a means of keeping posted on matters of general information (Tr. 36822-23).

From 1907 until Kosmos joined the Institute in 1933 it compiled its own rate information (Tr. 36982; 36878).

At that time Kosmos carried a complete set of freight tariffs from Kosmos' mill and competing mills (Tr. 36878). Kosmos has since used the Institute rate books instead of compiling freight information from official railroad tariff because it affords a saving (Tr. 36983). The rate books are used to determine the rate on shipments moving from the Kosmos mill and to help analyze delivered price quotations (Tr. 36821-22). Kosmos uses the correct tariff rate if it finds an error in the Institute rate books (Tr. 36982; 36985-86).

Paragraph 39

(*Lawrence*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Lawrence Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Lawrence is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 39 that the policies and practices of Lawrence have been adopted or carried on as the result of understanding or agreement with any other respondent. Further exception is taken to the failure to report that the vice president in charge of the sales of the Lawrence Company appeared as a witness and testified regarding all the matters at issue and showed that Lawrence has not adopted or used any policy or practice as the result of understanding or

agreement with any respondent (Tr. 7113-14; 7347; 7360; 8198; 8205; 31135-36; 31140; 31184; 31195; 31200-01; 31206; 31228; 31268-69; 31274; 31277-78; 31324).

4. Exception is taken to the failure to report the following evidence concerning the Lawrence Company generally:

The limits of the area in which Lawrence sells cement are not arbitrarily fixed. In general, the company solicits business in those areas to which it feels it can render service satisfactory to customers and can gain and retain customers at a reasonable return to itself. During winter months, the company extends its solicitation further than in summer in order to keep its plants operating.

The present normal marketing territory of Lawrence comprises the six New England states; all of New York except the western quarter; New Jersey; all of Pennsylvania running west to a line drawn roughly north and south through Altoona; Maryland; Delaware; and Virginia as far south as Richmond. In any particular market within that area, Lawrence competes with about twenty other cement sellers (Tr. 7115; 31165-70). When a regular customer secures a job outside of Lawrence's normal territory, Lawrence will ship beyond in order to maintain its relations with him (Tr. 31184).

During the period that Lawrence has been in business it has abandoned solicitation in many areas in which it formerly sold cement because competitive conditions, such as the establishment of new, more adjacent mills and lowering of prices, made further sales in such areas unattractive (Tr. 31140-47; 31187-91; 31278-82; 32866-84).

In addition to its two mills, Lawrence operated a warehouse in Washington, D. C. from about 1930 to 1932. In 1932, after it had found that it was not gaining sufficient business to warrant the large cost of operation, Lawrence abandoned this project (Tr. 31140-47; 32866-84).

Lawrence's Siegfried, Pa., mill has an annual capacity at the present time of about 2,800,000 barrels. From 1910 until about 1930, this mill operated at substantially full capacity. In 1931, operation of this mill dropped off to 33% of capacity and continued to diminish until it reached

its low point of 16% in 1935. Sales and production costs at this mill have consequently increased considerably (Tr. 7114-15; 31148-65; 31170-83; 31208-21; Resp. Ex. 2183). Lawrence built its Thomaston (Rockland), Maine, mill in 1928. Large demand in the area and a protective tariff on foreign cement made the Thomaston mill appear to be a profitable proposition even though its cost of operation figured to be greater than that at Siegfried. Under these existing favorable conditions during the first two years of operation, the mill was able to sell virtually its entire output. Thereafter, however, demand fell off drastically and low-priced foreign cement imports increased rapidly in all of the mill's principal markets. The result has been losses in eight out of ten years' operation and a total loss at this mill during this period of over $1,000,000 (Tr. 8208-13; 8220-21; 8223; 8227; 8228-32; 31148-65; 31170-71; 31178-80; 31208-21; Resp. Ex. 2183). The Thomaston mill has an annual capacity of about 1,200,000 barrels. Although it operated at substantially full capacity for the first two years of its existence, its percentage of operation to capacity dropped off steadily to a low point of 17% in 1935 (Tr. 7114-15; 8210; 31173; 31183-84; Resp. Exs. 2183; 3765 C).

When Lawrence established the Thomaston mill, the action did not have the result of forcing its competitors out of the State of Maine. Lawrence was able to take some business away from its competitors by reason of its service advantage, but its competitors still solicit and still sell cement in Maine and Lawrence's Maine mill enjoys no tremendous advantage (Tr. 7297-98; 8208; 31189-91).

Lawrence is not affiliated with any other cement company nor are any of its officers or directors connected in any way with any other cement company (Tr. 31140).

5. Exception is taken to the failure to report the following evidence with respect to Lawrence's membership in The Cement Institute:

Lawrence joined The Cement Institute at the time of N.I.R.A. in 1933 because the Institute had been revived to serve as the vehicle to draft an NRA Cement Code for presentation to the NRA (Tr. 31273; 31275-77). The con-

pany had not been a member at any time prior to that time. The Cement Institute never had anything to do with prices or formulation of policy or practices so far as Lawrence was concerned. The Compendium of Established Terms and Marketing Methods was not used in any way by Lawrence (Tr. 31269; 31277-78).

Lawrence has received and used freight rate books published by The Cement Institute since the institution of that service. Prior to the time it became a member of The Cement Institute in 1933, Lawrence subscribed to the Institute books and paid about $75 per month therefor (Tr. 31272; 31273). Prior to the inauguration of the Institute rate service, the company used freight rate books published by the C.M.P.A. After the dissolution of the C.M.P.A., it used rate books published by the Nazareth Traffic Bureau (Tr. 31272-73).

Lawrence has had a voice in the determination of what shipping points should appear in the Institute rate books. They carry rates from a greater number of shipping points than any rate books Lawrence formerly used (Tr. 31273).

Lawrence uses Cement Institute freight rate books because they are far more economical than it would be for the company to compile the freight rate information it requires in the operation of its business. It is immaterial to the company whether or not its competitors use Institute rate books (Tr. 8222; 31272; 31327-28). The vice-president in charge of sales testified that the company has never had any agreement with any competitor regarding the use of the Institute or any other freight rate books (Tr. 31274).

6. Exception is taken to the failure to report the following evidence with respect to bids of the Lawrence Company:

The three bids cited in Paragraph 39 were all in response to invitations of federal agencies for bids f.o.b. destination only and Lawrence bid as requested (Com. Exs. 372 B; 384 M; Resp. Exs. 1713 A-N; Tr. 1576-77).

The bid of January 18, 1935, occurred during the period when the NRA Cement Code was in effect and the invitation to bid required compliance with the Code. The price

bid by Lawrence on this letting had been filed with the Code Authority by one of the bidders pursuant to NRA Code provisions and transmitted by the Code Authority to the other potential bidders including Lawrence. This price was 20 cents below the current market price at the destination involved. All bids were rejected as being too high and readvertised. Lawrence bid on none of the subsequent lettings (Com. Exs. 178 A-C; Resp. Exs. 193; 810-15; 1718).

On the letting of Sept. 6, 1935 referred to in Com. Ex. 372 A cited in the Report, Lawrence quoted the current market price at the destination at which the government requested bids (Com. Ex. 372 B; Resp. Ex. 813).

On the letting of May 18, 1937, referred to in Com. Ex. 1099 W cited in the Report, with one exception none of the prices Lawrence quoted reflected any base figure. Moreover, all of the prices Lawrence quoted were the current market prices at the points at which the government requested bids (Com. Exs. 551 O, V, X, 2C; 1166; Resp. Exs. 763; 764; 766; 767; 774; 3715).

All of the bids that Lawrence has submitted to government agencies, state or federal, have, with one exception, been in response to invitations calling for f.o.b. destination prices only. In the exception, the invitation called for an f.o.b. mill price and Lawrence bid as requested (Tr. 1576-77; 31191; 31193; Com. Exs. 10; 14; 15 A-B, N; 155 A-E; 178 A; 372 A-B; 378 M; 379 N; 389 i; 381 N; 382 L; 383 M; 384 M; 386 G; 387 A-J; 1099 A-D, M, R, W; 2771-72; Resp. Exs. 768 A-i; 784 A-C; 1713 A-N; 3688 A-N).

In quoting on invitations for sealed bids, Lawrence quotes its current commercial price at the destination or destinations in question. The vice president in charge of sales explained Lawrence's bidding procedure in full and showed that the company has never had any agreement with competitors with regard to prices to be quoted on invitations for sealed bids (Tr. 7361; 31195; 31197; 31199).

Lawrence has never sold cement in any territory in which land grant rates were available to the federal government (Tr. 7290). Its sales to the federal government do not amount to more than 1% of the company's total sales (Tr. 31195).

7. Exception is taken to the failure to report the following evidence with respect to Lawrence's pricing policies:

"It has always been the policy of the Lawrence Company to quote delivered prices because its customers have always wanted to know what cement was going to cost them at the point where they intended to use it (Tr. 7287; 31191-92). At any particular destination, the company quotes as its price the price that it believes to be the market price at that destination. This price will at some destinations reflect a base figure at one of Lawrence's plants; at others, a base figure at the plant of some competitor; and at many others, no base figure at all. Lawrence considers the market price at any particular point to be the highest price it can secure for its product and it learns what the current market prices are from its customers and from its salesmen (Tr. 31223-27; 31228-32).

For the past fifteen years, it has been the company's policy to make the same price to all customers of the same class in the same market at the same time. Prior to the time that Lawrence adopted this policy, it made secret prices and rebates to some customers in the expectation of increasing its tonnage thereby. The company soon acquired a reputation for making special prices with the result that customers who had hitherto been satisfied to pay the market price complained of better treatment accorded others and took their business elsewhere. The net result was that Lawrence lost more business than it gained and thereafter announced and adhered to its present policy (Tr. 7127-31; 31233; 31269-72).

The evidence shows that Lawrence's competitors have never provided it with advance information with regard to price changes initiated by them (Tr. 31199; 31202-06; 31228; 31258-59).

Lawrence has initiated price increases on two occasions in recent years. In August of 1929, Alpha had reduced prices in the Atlantic and New England states by amounts reflecting a 30-cent reduction in Alpha's mill base. After this decrease prevailed for several months, Lawrence, in November, in an effort to recoup some of the losses it had from the low prices, raised its prices at all points in

its marketing territory by a flat 30 cents. Most of Lawrence's new prices were followed by all of its competitors. Some competitors, however, did not follow the full 30-cent increase at all points. Accordingly, Lawrence had to send out new quotations to these points meeting the lower prices quoted there by competitors.

Lawrence increased its prices on July 11, 1933, in order to maintain wage increases and shortened hours of labor instituted in compliance with President Roosevelt's request made previously. On this occasion, the company sent special announcements to all of its customers and prospective customers explaining the reasons for the price increases (Resp. Exs. 536, 2184 for id.; Tr. 7157-58; 23367-69; 31235-43; 31248; 31255-56).

The vice president in charge of sales testified that Lawrence recognizes some mills of competitors as basing points but that it never knows in advance of any change in the status of any competitive mill and that Lawrence has never had any understanding or agreement with any competitor to recognize or maintain any mill as a basing point or to maintain or recognize any specific basing point (Tr. 31201; 31206).

Lawrence's Siegfried mill has always been a so-called base mill. When Lawrence was building its plant at Thomaston in 1928, it considered the question of whether or not it should operate it as a base mill and finally decided, prior to the time that the plant went into operation, to meet existing competitive prices at all points at which the company might seek business. This decision was influenced by the fact that, while the Thomaston plant was well located with respect to raw materials, it was situated at some distance from its principal markets and was at a disadvantage freightwise to many of them as compared with its prospective competitors (Tr. 7145-46; 8208-18; 8220-21; 31148-62; 31200-01; 31208-21). Lawrence continued its policy of merely meeting competitive prices on shipments from Thomaston until May, 1938. At that time Lawrence was soliciting a large order of cement for use at the Mattawanka Dam. In order to get this business, the company made a special price at the dam. Lawrence also reduced other prices in the area, reflecting the same figure, at

its Thomaston mill as the price bid at the dam. Lawrence did not give any of its competitors advance information of its intention to reduce any of these prices. Competitors met the prices reflecting the new base figure at Thomaston (Tr. 7115-16; 8198-99; 8205; 8218-20; 31200-02).

8. Exception is taken to the failure to report the following evidence concerning Lawrence's dealer policies:

Lawrence announced its most recent marketing policy to the trade under date of April 9, 1935, in order to meet new and more favorable terms announced in policies previously issued by some competitors. The evidence shows that Lawrence's action was not the result of consultation, agreement or understanding with its competitors (Com. Ex. 270 *J*; Tr. 7360-61). Lawrence has always sold cement to the federal government at its minimum prices. Its sales to the federal government have never amounted to more than 1% of its total sales (Tr. 7361; 31195).

Eighty-five per cent of Lawrence's business is in the nature of repeat orders largely from dealers and block manufacturers (Tr. 31232-33).

Lawrence has never had any agreement with any of its competitors with regard to terms and conditions of sale (Tr. 31261-69).

9. There is no such exhibit as Resp. Ex. 270 J, cited in Paragraph 39. Resp. Exs. 1459 and 1472 A and Tr. 7285 cited in Paragraph 39 in connection with Lawrence's dealer policies bear no relation to that subject.

Paragraph 40

(Lehigh)

1. Exception is taken to any implication that the statements and references in Paragraph 40 connect the respondent Lehigh with group or collective activities to which reference is made in the footnote on page 9 and in Paragraph 82 on the ground that it is not supported by the evidence.

2. Exception is taken to the failure to report the testimony of responsible executives of Lehigh which shows that Lehigh has never been party to any agreement or understanding with any competitor or others regarding any of

the matters in issue in this proceeding. (Pricing generally, Tr. 26617; basing points, Tr. 26657; establishment of bases at competitors' mills, Tr. 26918; establishment of port bases, Tr. 26973; particular price changes, Tr. 26930-31; a sealed bid, Tr. 27054; the control clause, Tr. 27076; dealer policies, Tr. 26741-42; 26765; terms of sale and contract forms, Tr. 26821-22; trucking, Tr. 26893. See also Tr. 26871; 26874-75 and following exceptions to Paragraph 40.)

As to the Company Generally:

3. Exception is taken to the failure to report the following:

Lehigh markets cement in all of the United States east of the Rocky Mountains, except Michigan, and portions of Texas and New Mexico. From its Metaline Falls, Washington plant it also sells cement in most of the State of Washington and in portions of Montana, Idaho and Oregon (Tr. 26550).

Lehigh has experienced a normal expansion and has, from time to time, constructed or acquired additional mills for the purpose of retaining its established trade in areas where its loss was threatened by the competition from new mills which quoted prices lower than those which Lehigh could afford to meet from its existing mills. In selecting new mills, Lehigh has considered their accessibility to raw materials, fuel and markets (Tr. 26562-66; 26571; 26574-95; 26599-100).

Lehigh has made constant and repeated improvements in its plants in order to obtain greatest operating efficiency and low costs. For the past five years its capital expenditures for modernization of its plants have averaged approximately $1,000,000 a year (Tr. 26600-04).

As to Price Policies and Practices:

4. Exception is taken to the failure to report, with regard to Lehigh's policy of quoting prices to public and private buyers, the following:

> "Our policy with respect to prices to both public and private buyers rests on the fact that the market is at the point of destination. We have what I would estimate would be some seven to eight thousand

of such markets which are steady points of cement consumption, and for which we quote our prices regularly.

"Sometimes these prices are prices we have originally quoted. Sometimes they are lower figures quoted by competitors and which we have met. At every one of these markets there is, thus, a market price. That market price is recorded in our records and is the price that we quote.

"In some cases that price analyzed, along with other prices, reflects a base figure at a competitive mill. In other cases it does not.

"In any event, all we know about competition is what we discover in the field" (Tr. 27061-62; see also Tr. 26612).

and with regard to delivered prices, the following:

"I have never found either a private or public buyer who ever determined his purchase of cement on anything other than his cost at destination" (Tr. 27063).

5. Exception is taken to the failure to report the following:

There have been standard specifications for Portland cement for at least thirty years (Tr. 26606).

Lehigh's price must be at least as low as the price of its competitors or it cannot hope to participate in the business (Tr. 26606-07).

Lehigh sales are made at delivered prices because it finds that competition is as the destination and its customers desire delivered prices (Tr. 26610-11).

It has been Lehigh's practice to quote delivered prices for 25 or 30 years. The practice was not initiated at any particular time but was a gradual development (Tr. 26612-13).

In the few instances where Lehigh could not discover a going market price for commercial business it has analyzed competitors' quotations at adjacent markets and quoted the lowest figure which the analysis indicated any competition might be likely to quote (Tr. 26613-15).

Lehigh publishes its quotations to the trade in all the areas where it sells, and does not sell at any prices other than those which it so publishes. Lehigh has from time to

time discovered that competitors have secretly quoted prices in some markets which were lower than the going market price. In such instances Lehigh has either foregone the business in those markets or endeavored to meet the lower prices by quoting a lower range of prices to all customers in the affected markets (Tr. 26615-16).

Lehigh learns of the prices quoted by its competitors from constant contact with the consuming trade. Lehigh secures prompt information from this source (Tr. 26650-51; Resp. Exs. 1140-1298).

Lehigh determines what mills are base mills and what mills are non-base mills by analyzing price information it has secured from the consuming trade. The company keeps a record of such information as it develops (Tr. 26651; 26673; Resp. Exs. 1109 A-D).

Lehigh does not distribute basing point lists to its competitors nor has it received such lists from any of its competitors (Tr. 26655-56).

Lehigh keeps a record of all the prices it quotes for all of the destinations where it solicits business (Tr. 26657-60; 26663-71; Resp. Exs. 1110-12).

There are many cases where the destination prices, which Lehigh discovers, do not relate back to any base figure. Lehigh has quoted such prices and sells in many territories where such prices prevail. Lehigh finds such prices around most metropolitan markets; around some cement plants; and on sales to railroads. Lehigh also finds flat prices applying over extended territories and also special prices along the Atlantic seaboard. In addition Lehigh finds many secret departures from manufacturers' announced prices (Tr. 26672-73).

Lehigh has found that a great many plants have become basing point mills that were at one time non-base mills and vice versa. The tendency has been strongly in the direction of an increased number of basing point mills (Tr. 26673).

All Lehigh mills are base mills. In determining whether or not its mills should be base mills or non-base mills, Lehigh has considered from time to time the situation of each mill separately and has taken into account all of the competitive factors relating to the sales of each mill. Its deci-

sion to make a mill a base mill has in all instances been in an effort to reduce, as far as possible, the number of competitors entering into the territory served by that mill (Tr. 26673-83).

For example when Lehigh purchased its Union Bridge mill in the fall of 1925 this mill was a non-base mill. After operating the plant for some months Lehigh on July 1, 1926 made it a base mill in order to set in motion competitive pressure which Lehigh hoped would make it more difficult for the Lehigh Valley mills to sell in the principal markets of the Union Bridge mill which were Baltimore and Washington. The establishment of the Union Bridge mill as a base mill very definitely made it more difficult and less attractive for the Lehigh Valley mills to ship cement into the markets usually served by the Union Bridge mill (Tr. 26677-78).

Similar reasons governed the establishment of other Lehigh mills as base mills (Fordwick, Tr. 26676; Mitchell, Tr. 26674; Mason City, Tr. 26678; Iola, Tr. 26678; Oglesby, Tr. 26679; Boyles, Tr. 26680; Metaline Falls, Tr. 26682).

In each case where Lehigh made a mill a base mill the price was thereby reduced. The establishment of any mill as a base mill must reduce prices below the level existing when the plant was a non-base mill (Tr. 26676).

Lehigh has never agreed, nor has it had any understanding with any competitors as to the manner in which Lehigh or its competitors would arrive at prices or as to what base figures should be used in arriving at prices (Tr. 26616; 26617).

As to Origin of Use of Basing Points by Lehigh:

6. Exception is taken to the failure to report the following:

Prior to 25 or 30 years ago, all of Lehigh's sales were made to distributors. Sales to the distributors were made at intervals and covered fixed quantities of cement. In the beginning such sales were at f.o.b. mill prices. The distributor could then sell the cement at whatever price he chose in the territory allotted to him. Shipments were consigned directly to the distributor's customers pursuant to

instructions given to Lehigh by the distributor (Tr. 26618-21).

Distributors sold cement to dealers, contractors, railroads and consumers (Tr. 26625):

By 1911 the function of the distributor and his relations with Lehigh had undergone a considerable change.

New mills had been built throughout Lehigh's sales territory and an increasing number of cases occurred where a distributor faced the local competition of these new mills. The Lehigh distributors who had committed themselves to Lehigh for cement at a definite price f.o.b. Lehigh's mill could not meet the prices in the markets quoted by the new local mills because the Lehigh distributor's f.o.b. mill price plus freight was higher than that quoted at local destinations by the new local mills. In such cases, and in order to preserve its own business, Lehigh made an adjustment with or concession to its distributor to enable him to meet the competition of the local mill at destination. Cases of this sort multiplied rapidly and under the pressure of this development Lehigh's distributor in an increasing number of cases was selling Lehigh cement at destination at prices that were arranged between himself and Lehigh in order to compete with the prices quoted at destination by the new local mills. In an increasing number of cases Lehigh gave the distributor an f.o.b. destination price in order to meet this local competition (Tr. 26622-28).

As early as 1911 Lehigh considered a competitive mill, whose local prices the Lehigh distributor had to meet, as a base mill for the territory involved (Tr. 26631-37).

By 1911, most of the shipments made by distributors were sold at prices mutually agreed upon between the distributor and Lehigh, in order to meet the local competition of new mills (Tr. 26626). The distributor had changed his status from that of an independent business man having full control of sales in his allotted territory, to the status virtually of a broker selling for the account of Lehigh. By 1911 Lehigh reached the conclusion that distributors had outlived their usefulness. It, therefore, eliminated all of its distributors and set up in their place its own sales organizations (Tr. 26626-27; 26629).

Upon the elimination of its distributors, Lehigh quoted many of its prices f.o.b. destination just as its distributors had been doing in order to compete with the prices of new base mills. By about 1913 all Lehigh's commercial quotations were at destination prices (Tr. 26627-28).

By at least as early as 1911 dealers expressed themselves to Lehigh as preferring f.o.b. destination quotations over f.o.b. mill quotations (Tr. 26645).

As to Development of Dealer Policies:

7. Exception is taken to the failure to report the following:

When Lehigh first sold cement to dealers it also sold directly to consumers in some cases. Contractors at that time were usually not in a position to handle large jobs by direct shipments from mills (Tr. 26685-86).

The minimum quantity which Lehigh would sell to dealers was the carload lot (Tr. 26686).

Beginning in 1912 more and more large jobs arose on which contractors were in a position to handle shipments made directly from the mill. Incidents increased in number where Lehigh was faced with getting business by a direct sale to a contractor at the risk of losing the good-will of a dealer (Tr. 26686). Lehigh had discovered that it was not in very good standing with dealers because distributors had been in the habit of making direct sales to contractors indiscriminately (Tr. 26687). It was decided that Lehigh's business could be better developed by concentrating on dealer sales instead of direct-contractor business and in early 1913 Lehigh adopted a policy in many territories of selling cement only to dealers on jobs which required less than 7,500 barrels (Tr. 26689).

Because of misrepresentations by contractors who overstated the amount of their requirements, Lehigh, in 1913, increased the minimum quantity which it would sell to contractors to 15,000 barrels (Tr. 26690).

In Lehigh's western territory by 1914, Lehigh was following a general policy of quoting contractors, regardless of quantity, 5 cents per barrel higher than it quoted to dealers (Tr. 26691, 26693).

In the East, during the greater part of 1914, Lehigh had no definite policy of dealer protection but sold in the manner which seemed most expedient. This proved to be very unsatisfactory and in the latter part of 1914 Lehigh adopted a definite policy in New England by virtue of which it refused to sell cement for jobs requiring less than 5,000 barrels to anyone other than dealers. Most of Lehigh's competitors did not follow Lehigh but the policy was a success. Later, the minimum quantities which were sold to customers other than dealers were raised to 10,000 and subsequently to 15,000 barrels (Tr. 26694-97).

The results of dealer protection were so encouraging that early in 1915 Lehigh made a definite announcement throughout its entire sales territory that its prices to contractors would be 5 cents per barrel higher than prices to dealers irrespective of the quantity involved (Tr. 26694-97). This 1915 policy proved to be very popular with Lehigh's dealers and most of Lehigh's competitors ultimately followed some plan of general dealer protection (Tr. 26697-98).

The federal and state governments and railroads have always been sold cement by Lehigh at prices as low as those made to dealers (Tr. 26693).

The inauguration of this five cent dealer protection policy created a need for clearly distinguishing customers who were entitled to a dealer's price. Lehigh at that time adopted a conception of what constituted a dealer in order to be able in good faith to apply the policy which it had announced and which it had assured the dealers it would observe (Tr. 26698-99).

In early 1916, many of Lehigh's dealers, because of higher operation costs, were quoting their customers 10 cents per barrel higher than they paid Lehigh. To help them Lehigh increased its 5 cent margin between the prices to dealers and to contractors to 10 cents per barrel. From 1917 until about 1921 war-time regulations and a subsequent shortage of materials removed all problems relating to dealer marketing policies (Tr. 26699-700).

Beginning about 1921 highway construction was undertaken on a large scale. Many large highway projects came

up in isolated locations where the dealers were ill-equipped to handle the work and the question of the value of their service was somewhat debatable. Many of Lehigh's competitors who did not have as great a stake in the dealer business as Lehigh encouraged their dealers to quote prices much below the 10 cent margin. Also, persons not directly engaged in the building material business were encouraged by competitors to buy cement ostensibly as dealers for resale at very low margins with the result that Lehigh's best customers who were established dealers, and who as such carefully calculated their costs, were unable to meet such competition. In turn, Lehigh also lost the business (Tr. 26701).

By 1926 Lehigh decided it must change its policy if it wanted to hold its position with the dealers. During the summer of 1926 it adopted a plan which was called the "Dealer Discount Method of Selling". This consisted of quoting all customers the same prices but in addition to the usual discount for cash payment dealers were granted a trade or dealer discount of 10 cents a barrel which was not given to contractors (Tr. 26701-03; Com. Exs. 971-33L to 340, p. 11).

This plan was introduced into the western and southern territories simultaneously with the quotation of new prices ten cents per barrel above the prices previously quoted to the trade, but since the dealers were then getting a ten cent trade discount the new quotations gave dealers the same net cost for cement as they had before the plan was put into effect (Tr. 26702-03).

In the east Lehigh proceeded somewhat differently because of the competitive situation there present. The Lawrence Company had issued quotations to its dealers providing that its ten cents per barrel discount for cash payment would be granted for payment in cash within thirty days instead of the ten days from date of invoice given by Lehigh. This longer discount period substantially increased the credit risks and Lehigh did not think this step was sound business (Tr. 26704).

In attempting to deal with this situation, Lehigh quoted dealers the same prices that they had been quoted before but allowed them an added ten cent dealer discount, thus

giving the dealer cement at ten cents per barrel less than the prices previously prevailing. In addition Lehigh extended its discount for cash payment from ten days to fifteen days. This combination of reducing the cost of cement to dealers by ten cents and of extending its cash discount period was an effort by Lehigh to maintain the good will of dealers and to meet the competition of Lawrence (Tr. 26704; 26705).

This dealer discount plan worked out satisfactorily for a while but by 1929 or 1930 the situation was about the same as it had been in 1926 (Tr. 26703-06). Dealers were unwilling to carry out the normal dealer functions and some of Lehigh's competitors undertook to relieve dealers of the performance of one or another of those functions. Usually they relieved dealers of credit responsibility. Lehigh found in an increasing number of cases that its competitors either took a formal assignment of a contract between dealer and contractor or else made an arrangement with the dealer that the dealer would not be held responsible for the contractor's account. In this manner Lehigh's competitors were in fact selling to contractors at a dealer's price. Lehigh had always maintained that the dealer's function was entirely separate and distinct from the manufacturer's, and he ought to carry his own credit accounts. Lehigh's dealers, therefore, operating under such restrictions were greatly handicapped in their efforts to get larger contract business (Tr. 26707-09).

In the summer or fall of 1929, one of Lehigh's competitors issued quotations to the trade eliminating any trade or dealer discount. Lehigh did not follow this plan because it had spent much time and effort building up dealer business and had what it considered an outstanding position with respect to dealer business. Lehigh also thought that the elimination of trade or dealer discounts was bound to lead to general direct selling, a method of selling which Lehigh did not wish to undertake. In order to compete with its competitors who had eliminated trade discounts Lehigh established in November, 1930, a new plan of marketing called the "Dealer Service Payment Plan" (Tr. 26709-10; Resp. Ex. 630). The plan provided for the payment to dealers of 5 cents per barrel at the end of each calendar

year on all cement which had been invoiced to the dealer during that year, in consideration for the dealer service in providing Lehigh with an outlet for its product and conditioned upon the dealer's representation that his sale to contractors had not been made at a price lower than Lehigh's price to the contractor at the same time and place (Tr. 26713-14). By the plan Lehigh intended that dealers accepting it would obtain more profitable business than they had been having. In order to encourage acceptance of the plan, Lehigh quoted prices to dealers which were slightly lower in ultimate cost than its prices had been previously (Tr. 26715-16).

The plan met with a mixed reception upon the part of the dealers and although many competitors followed Lehigh's plan, many others did not adopt the plan. Some of these competitors made reductions in their prices and continued to offer dealers both the dealer and cash discounts. Lehigh had to meet these reductions (Tr. 26717). During several succeeding months Lehigh was forced to meet several such price reductions made by its competitors, and by March, 1931 it decided that the new plan could never be successful. On March 16, 1931 it adopted a policy of allowing only a cash discount of 10 cents per barrel, without any deduction, and contractors were sold at the same price that Lehigh sold cement to dealers (Tr. 26724-26; Resp. Ex. 669).

Federal and state governments and railroads were at all times given the same discounts as were given to dealers (Tr. 26709).

Although many competitors issued statements declaring what kinds of work they would sell through dealers and what kinds of work they would sell direct to contractors, after March 16, 1931, Lehigh, instead of following a fixed policy so far as dealer relations were concerned, met the various competitive situations as they arose and sold cement through dealers when competition permitted and sold direct to contractors when they found that their competitors were also selling direct to contractors, without issuing a statement as was done by some competitors (Tr. 26726).

At this time there was great diversity of practice between the various manufacturers. One manufacturer would refrain from quoting direct to a contractor for a job in an effort to protect his dealer connection; whereas, other manufacturers, either because they had no dealer connection in the particular market or had no particular interest in the dealer business, quoted direct to the contractors (Tr. 26729-30). Gradually, however, a general practice began to develop. In the large markets where dealers were strong enough to secure protection, jobs were sold directly through dealers; whereas, outside of the urban communities jobs were usually sold direct to contractors (Tr. 26732-33).

The adoption of Article XI of the NRA Cement Code caused Lehigh to make comparatively few changes in the practices relating to direct sales and sales through dealers from the practices that existed generally before that Article was adopted (Tr. 26733-34). After Article XI was suspended in January, 1934, Lehigh reverted to the same position it had been following prior to the adoption of the Code, which was to sell through dealers to whatever extent competition permitted (Tr. 26738-39). At the request of the National Recovery Administration there were numerous discussions between dealers and manufacturers toward reinstatement of Article XI in the Code (Tr. 26739-40). It seemed to Lehigh that delays in reestablishing Article XI were apt to be interminable and it concluded that an announcement of a definite sales policy would be favorably received by the dealers (Tr. 26740-41).

In February, 1935, Lehigh issued such a statement of policy to its own customers. The statement was prepared by a responsible officer of Lehigh who testified that he prepared the statement in collaboration with other executives of Lehigh and that the preparation of the policy was a comparatively simple matter because it was a re-statement of general practices which had been under competition hammered into existence during the period 1931 to 1933 and had been reflected in Article XI of the Code. Lehigh issued this statement as a result of its own decision and without any agreement with any of its competitors (Tr. 26741-43, 26765, Com. Ex. 643). With the exception of certain clauses, this policy was very favorably received by

dealers. In April, 1935, Lehigh issued another statement of policy which slightly revised its February policy (Com. Exs. 226-2 A, B; Tr. 26745). The April policy was somewhat more favorable to the dealers in that it provided for sale to dealers of more kinds of business than was permitted under the February statement and contained a complete definition of what constituted a dealer in almost the same language as the definition which had formerly been included in the NRA Code (Tr. 26747-48; 26757; Com. Exs. 226-2A, B; Com. Ex. 557; Art. XII, §3).

From the time of the creation of Lehigh's own sales organization it has found that its dealer trade is a strong foundation for the company's business because the dealer outlet is steady and provides a backlog around which all other business is built (Tr. 26751-52).

As to Terms of Sale:

8. Exception is taken to the failure to report the following:

Lehigh has booked customers at its prevailing market prices for shipments within 15 days from the date the order is placed and protects the customer for any normal or ordinary quantity of cement they might want to buy during this period. Lehigh has had this practice since at least 1911 (Tr. 26768).

Lehigh adopted a 5 day notice of increase in prices in 1932 to meet the competitive moves of other companies. Such notice had been used for nearly two years by Lehigh's competitors before Lehigh adopted it (Tr. 26776).

Lehigh makes all price reductions retroactive as to all shipments during the 5 days prior to the announcement. This practice was included in the NRA Code at which time Lehigh adopted it and has used it since (Tr. 26778).

The Specific Sales order form which Lehigh now uses was the form prescribed by the NRA Code at which time Lehigh adopted it. Lehigh found that this form protected it on specific sales orders and that it greatly smoothed its relations with its dealers (Tr. 26787-88).

The reservation in Lehigh's contract forms of the right to route shipments was adopted prior to 1913 and in order

to give Lehigh the right to avail itself of the lowest available rate and shortest possible route (Tr. 26801-02).

Lehigh's other contract terms have changed from time to time and still other terms have been built up over the years as the result of competitive and operating problems which Lehigh faced and found necessary to overcome (Tr. 26765-69; 26772-80; 26784-88; 26793-817; 26819-22; Resp. Exs. 1120-29).

Except during the period covered by the NRA Code, Lehigh always decided independently what terms of sale and other contract forms it would use. A responsible executive of Lehigh testified that these terms and contract forms were adopted without any understanding or agreement with any of Lehigh's competitors (Tr. 26821-22).

As to Diversions:

9. Exception is taken to the failure to report as follows:

Lehigh has for many years prohibited diversions of Lehigh cement from specific jobs and in transit (Resp. Exs. 1120-30).

Dealers at the destinations to which cement has been diverted complain to Lehigh. Frequently their sole cause of complaint has been the fact that their home markets in which Lehigh has given them exclusive privileges have been invaded by Lehigh dealers from other markets (Tr. 27248).

As to Trucking:

10. Exception is taken to the failure to report the following:

Lehigh first began to make deliveries to trucks about 1920, during a railroad car shortage which caused a shortage of cement throughout eastern territory although there was plenty of cement on hand at the mills (Tr. 26836). Lehigh cooperated with its customers to supply their needs by truck. Trucking at that time was looked upon as a temporary proposition. Most deliveries were invoiced at delivered prices arranged with the customers and an allowance was made for rail freight charges (Tr. 26836-37). In very large part its deliveries at that time cost the customer more at destination than car shipments (Tr.

26836). Truck deliveries continued under the same conditions in 1921 and 1922 due to various transportation difficulties (Tr. 26837).

By 1923 railroad transportation was on a normal basis and there was little demand for truck deliveries until about 1925 (Tr. 26837-38). The increased construction of highways and the expansion of the use of motor transportation brought about an increasing number of requests for truck delivery (Tr. 26838-39). Lehigh found at this time that there were a great many markets where their price to their dealers did not enable the dealers to compete with the dealers of competitive manufacturers. For example, in the city of Bethlehem, Pennsylvania, where the Lehigh Company had always done a great deal of business, Lehigh quoted its Bethlehem dealers its Lehigh base figure as an f.o.b. mill price, but found that Lehigh's competitors at a nearer mill were quoting the same price f.o.b. their mill. Since it cost the Bethlehem dealers less money to truck cement from the competitor's mill which was closer to Bethlehem, Lehigh had to adjust its price $.05 per barrel lower than the previous price quoted, to have an f.o.b. mill price which would allow the Lehigh dealers in Bethlehem to obtain cement as cheaply as those purchasing cement from Lehigh's competitors (Tr. 26841-43).

From 1929 through 1930 and 1931, trucking throughout the Lehigh Valley increased. Trucking during this period increased not because of savings or economies but because many of Lehigh's competitors used the unregulated trucking medium to give customers price concessions. In many instances, this took the form of Lehigh's competitors quoting a delivered trucking price, engaging a truckman to make the delivery and paying him an excessive trucking rate which he, in turn, refunded to the buyer in the form of a rebate or concession (Tr. 26844-45).

At the outset most of Lehigh's dealers were favorable to trucking because they thought it was a convenience and an economy. Soon a great many dealers told Lehigh that the anticipated benefits from trucking were more than offset by its adverse effects and Lehigh received a tremendous number of complaints that its own truck sales

were operating in such a fashion that Lehigh was not giving its dealers protection in their markets (Tr. 26847-48).

Lehigh found that a dealer would represent that it was purchasing cement for delivery in his truck to his warehouse but that instead of delivering it to that destination he would sell it in the market of some other Lehigh dealer. The same thing frequently happened even in the case of sales in which deliveries were made by hired trucks when dealers made private arrangements with the truckers (Tr. 26849-50).

In 1929 Lehigh found that many of their competitors were charging $.15 per barrel higher for deliveries to trucks, although their competitors were not making this charge in any uniform or complete way. Lehigh, in order to recover at least part of the cost of loading trucks as compared with loading cars, adopted a $.15 charge to some of its customers but not on all shipments. Where Lehigh found competitors quoting prices that included a $.15 charge, Lehigh would also make a $.15 charge if it did not result in having the Lehigh cement reach destination at a higher cost than that of its competitors. If Lehigh found that its price with the $.15 added made the cost of cement at destination higher than that of any of its competitors, it did not make that charge (Tr. 26852).

In 1927 Lehigh found that a competitive plant at Valley Forge had begun making certain sales by truck and that these sales had begun to increase rapidly, affecting Lehigh's business in Philadelphia with the result that Lehigh began to lose the business of many of its customers who took truckload lots f.o.b. the mill at Valley Forge. Lehigh attempted to meet this competition by making truckload deliveries from its Lehigh Valley mill. This did not prove satisfactory, either from the standpoint of the cost of delivery or from the standpoint of giving the customers good service. Lehigh then established a warehouse in Conshohocken in the early part of 1931, at which point it delivered entirely to customers by truck at prices f.o.b. warehouse at the same price which the competitive mill at Valley Forge was charging trucks at its mill. The maintenance of this warehouse increased Lehigh's cost of delivery but it was the most economical method that Lehigh could de-

vise in order to hold the business it had built up in and around Philadelphia (Tr. 26853-57).

In August, 1932, Lehigh was informed by the Pennsylvania and Reading Railroad that the railroad had completed negotiations with the Valley Forge plant to establish reduced rates. As a result of these new rates, the Valley Forge mill discontinued trucking. The competitive force of trucking being removed at Valley Forge, Lehigh closed its warehouse at Conshohocken (Tr. 26857-58).

In July of 1932 Lehigh decided to cease trucking at its Lehigh Valley Mills and to increase its prices. This policy was decided upon because Lehigh was losing considerable money and its officials felt that this move might induce their competitors to also cease trucking in that territory (Tr. 26859). Within a comparatively short time, Lehigh's competitors in the Lehigh Valley territory met its action in discontinuing trucking and followed its advance in prices (Tr. 28861).

Lehigh discontinued trucking from its Union Bridge and Fordwick mills about the same time it discontinued deliveries from the Lehigh Valley (Tr. 26862-63; 26865).

When Lehigh began operating its Union Bridge plant, it found that that plant had been making some sales to trucks, and Lehigh continued to do so up until the time that it discontinued trucking in Lehigh Valley. Lehigh's Fordwick plant was located in the isolated mountainous section of the state of Virginia, and there had been comparatively little consuming territory sufficiently close to that mill to permit trucking. At Union Bridge, Lehigh had no uniform method of quoting prices for delivery by truck. At its Fordwick mill, Lehigh prices for delivery by truck were at all times carload destination prices less an allowance of the rail freight. Lehigh's competitors at Hagerstown, Maryland and at York, Pennsylvania continued to sell to trucks in the area served by the Union Bridge plant for some time after Lehigh discontinued truck sales in that plant (Tr. 26865).

Lehigh discontinued trucking at its Newcastle mill the latter part of 1931, after it found that its competitors in that area had discontinued trucking. Lehigh had only undertaken trucking in that area to meet the competition,

and was glad to discontinue it when its competitors discontinued (Tr. 26869).

Lehigh found it necessary to establish warehouses in certain marketing areas, in order to place itself in a position to meet the competition of other companies who were situated closer to those areas and who permitted the trucking of cement from the mill. For example, Lehigh was forced to establish a warehouse in Washington in order to compete with the Lone Star Company who erected silos in that city and sold cement by truck from the silos (Tr. 26866). Lehigh also established warehouses to meet trucking competition at Pittsburgh (Tr. 28669), at Oswego, New York (Tr. 26882), Cleveland (Tr. 26881), and Miami, Florida (Tr. 26884). Lehigh still makes truck deliveries from its warehouses in all of these areas except Pittsburg where it discontinued its warehouse when its competitors in that area ceased trucking (Tr. 26866-84).

In every case where Lehigh has delivered shipments to customers' or company controlled trucks, it has done so honestly and for the purpose of meeting similar action of competitors which, at the time, was considered favorably by the dealers. When competitors have taken action to terminate deliveries to trucks, Lehigh has usually followed such action (Tr. 26865-68; 26868-69; 26877-80; 26882-83; 26883-85; 26885-86; 26886-88; 26888-90; 26891-92; Resp. Exs. 1259-65).

The truck shipments from the Lehigh Valley mills of the Lehigh Company never exceeded 10% of the total shipments from these mills. At the Union Bridge and Fordwick plants only a small proportion of shipments consisted of sales to trucks (Tr. 26862). A very small amount of cement was sold to customers' trucks from Lehigh's (Great Lakes) Buffalo mill. Trucking is unpopular with many of Lehigh's customers in that market (Tr. 26880). Only a small percentage of the total shipments made in any one year from the Iola mill have been made by deliveries to customers' trucks. No deliveries have been made to trucks from the Birmingham, Oglesby, Mason City, or Metaline Falls mills (Tr. 26891).

Lehigh has on no occasion disclosed to any of its competitors what action it would take concerning trucking, and

at no time that it has taken such action has it known what action competitors would take as the result of Lehigh's action. Lehigh had no understandings or agreements with competitors regarding any decisions relating to trucking (Tr. 26871; 26875; 26893).

As to Zone Prices:

11. Exception is taken to the failure to report the following:

When shipments began to be made from the Great Lakes Company (Buffalo) plant at Buffalo, Lehigh was faced with the problem of how prices to customers of that plant should be determined. The rates for most of the deliveries into Buffalo were switching charges which varied greatly according to the points within the city to which the cement was to be shipped. There were numerous customers located in various parts of the city, both within the switching limits and outside of the limits. After studying the problem carefully, Lehigh decided to quote all dealers within the Buffalo area at the same price because all of them were in competition with each other. The price quoted was 20¢ lower than any prices which Lehigh had previously quoted in that market (Tr. 26822-23).

When shipments began to be made from the Cleveland grinding plant of the Great Lakes Company, a situation similar to the Buffalo situation existed and it was handled in the same way (Tr. 26823).

Lehigh quotes to all dealers in the New York metropolitan market the same price irrespective of the fact that freight rates to the destinations of some of the dealers are higher than the rates to the destinations of others. This has resulted from the development of efforts to equalize prices to buyers in competition with each other (Tr. 26824-26; 26828-29).

In areas around the various competitors' mills and in numerous metropolitan areas where Lehigh finds prices which bear no relation to any base figure, Lehigh meets those prices or retires from the field (Tr. 26823).

As to Establishment of Bases at Competitors' Mills:

12. Exception is taken to the failure to report the following:

Due to a sharp falling off in demand for cement during the latter part of 1930 and continuing into 1931, Lehigh discovered many cases where competitors were quoting secret prices which were lower than their published prices (Tr. 26894).

It had been Lehigh's policy for some twenty years to sell cement only at its published quotations (Tr. 26894; see also, Tr. 26912-18).

As the secret price concessions became more numerous, Lehigh lost a great deal of business (Tr. 26894).

In accordance with its established price policy, Lehigh made a number of general reductions in its openly quoted prices in order to meet these secret price concessions, and eventually Lehigh was selling at prices very much below cost. In the Spring of 1931 Lehigh quoted prices which reflected base figures at some of the mills of competitors at which they had found the greatest number of price concessions. In no case were these base figures lower than the base figures of the nearest mill of Lehigh, nor were they lower than the base figures reflected by a substantial volume of sales made by these companies. Lehigh's action in all these cases was governed by a desire to prevent its competitors from taking away Lehigh business and also by the desire to give the same price to all customers who were in competition with each other (Tr. 26897-98; see also, Tr. 26902-05).

One other occasion on which Lehigh quoted prices which reflected base figures at a competitor's mill was in connection with the plant constructed by the State of South Dakota in 1926. Lehigh received reports that contractors doing work for the state were compelled to use state cement. South Dakota had been one of Lehigh's best markets for cement produced at its Mason City plant, and this business had sharply declined. Lehigh also obtained information that many prices quoted by the South Dakota plant were lower than their openly published quotations. In order to protect itself, in 1927 Lehigh quoted prices in South Dakota which were calculated with reference to the same base figure at the South Dakota plant that Lehigh was then using at its Mason City plant (Tr. 26905-06; see also, Tr. 26907-08).

Lehigh did not establish any bases at competitors' mills as a result of any agreement or understanding with competitors (Tr. 26918).

As to Imported Cement:

13. Exception is taken to the failure to report the following:

Beginning in 1925 Lehigh received information through its contacts with the trade that there was a steady increase in the amount of foreign cement which was being imported to the United States, until during the depth of the depression, when the volume was considerably reduced. However, about 1936 cement imports again increased (Tr. 26944-45).

Lehigh has found that at all times the prices of foreign cement were lower than the prices Lehigh had quoted on its domestic product (Tr. 26946; Resp. Exs. 1255-58; 1261; 1268-77; 1279-80). Lehigh's Boston Manager reported by letter dated October 13, 1936, in part as follows:

> "Mr. Johnson advised me he is buying Obarg Cement for $1.50 a barrel, loaded on his truck in Boston and he is paying 30¢ a barrel trucking charge to Fitchburg. This gives him a price of $1.50 net or a saving of 54¢ a barrel. He advised me he has handled more cement this year than in some years and will not stop handling Foreign Cement until the conditions warrant it.
>
> * * *
>
> This morning, while on my way to Framingham, I stopped in to see Earl Eichler, of the Waltham Coal Company. He has bought in the past month a few odd lots of Foreign Cement. He pays $1.41 at the dock in Boston with a 12¢ per barrel trucking charge to Waltham. This gives him a price of $1.53 a barrel against his Waltham price of $2.04 net on Lehigh. This is a saving of 53¢ a barrel to them.
>
> I am passing this information along to you to let you know the dealer's position in his market. It seems to me that the American manufacturer is taking pretty good care in a lot of respects in protecting the dealer, but the dealer has forgotten all about what the American manufacturer has done for him" (Resp. Ex. 1277).

And also a report by Bowen, dated September 17, 1936, to the President of Lehigh, in which he said:

> "One of our dealers at Englewood, N. J., a few days ago bought 500 bags of German cement. We are not sure whether this was trucked from New York or from Port Newark, but we did see the invoice, which shows a price of $1.75 per barrel delivered by truck to Englewood, less 2% cash discount. As a matter of comparison, our price f.o.b. cars Englewood is $2.19 net paper.
>
> This is the lowest foreign price we have yet encountered in the New York area" (Resp. Ex. 1276).

From time to time Lehigh has attempted to meet the lower prices on imported cement, but in every instance the price of the foreign cement was further reduced (Tr. 26946).

Since 1925 Lehigh has at various times adopted several different methods of attempting to meet foreign competition. All of these methods were based upon the principle of attempting to meet foreign competition at the ports at which the cement entered the United States (Tr. 26953).

Lehigh established specially low prices at some of those ports, either in the form of special refunds on cement shipped into these areas in an attempt to put its customers in a position to meet the competition of imported cement, or by figuring prices by using some of those ports as basing points in order to have its prices at surrounding destinations such that they could meet the foreign competition (Tr. 26953-56).

Lehigh felt the impact of foreign cement so severely during 1936, that on December 8, 1936, it introduced extremely low prices at New York and Boston and used both of those ports as basing points from which to figure prices for the surrounding territory, with the result that the average net on this business was below cost (Tr. 26967-68; 26969-70).

Early in July 1938 Lehigh found quotations in the field issued by the Allentown Portland Cement Company which reflected the use of a basing point at the Allentown Company's Lehigh Valley mill 10 cents lower than the prevail-

ing base figure which Lehigh had previously found at Northampton, and also there were quotations indicating adoption of a base figure at the Valley Forge mill. These new base figures had the effect of greatly reducing the prices in a wide territory along the Atlantic Seaboard and in the Philadelphia market (Tr. 26971).

Lehigh did not have any understanding or agreement with any competitors concerning the establishment or elimination of these port bases (Tr. 26973).

Lehigh, as another means of combatting imported cement, in the summer of 1935 followed the lead of competitors in establishing stocks of cement in Brooklyn for truck delivery and selling it under conditions as nearly as possible the same as those under which imported cement was being sold. This practice was adopted solely in order to meet the competition so established and when the manufacturer who had originated the stocks discontinued it in December 1935, Lehigh likewise did so (Tr. 26966-67).

Lehigh had followed the leadership of some of its competitors who declined to sell their cement in the Boston and New York markets to dealers who handled imported cement. However, so many manufacturers failed to follow a similar policy that Lehigh's dealers handling foreign cement were able to purchase domestic cement from Lehigh's competitors. This placed Lehigh at a disadvantage and in about December 1935 Lehigh discontinued the policy (Tr. 26956-66).

As to Bids:

14. Exception is taken to the failure to report the evidence which shows the independent manner in which Lehigh arrived at the prices it bid on federal and state invitations. Such evidence includes contemporaneous documents used in the preparation of bids and testimony of Lehigh's officials describing the various steps followed by it in determining the prices which it bid. Lehigh has not had any agreement or understanding with any competitor in connection with any of its bids (Tr. 27008-12; 27018-34; 27036-54; 27059-77; 27080-84; Resp. Exs. 1299-1319; -1349-53).

15. With reference to Com. Ex. 166, exception is taken to the failure to report the following:

This exhibit refers to bids received by the United States Engineers, June 5, 1934, for delivery of 600,000 barrels of cement at Wiota, Montana for use in the Fort Peck tunnels. The invitation carried a schedule of land grant rates (Com. Ex. 164 X; 167 A; Tr. 1635).

Pursuant to the NRA Code all prices had to be filed with the Cement Code Authority (Com. Ex. 557). Three Forks filed a destination cost price of $2.7504 at Wiota, Montana, and an f.o.b. Trident mill price of $1.85 (Com. Ex. 164 I). The Code Authority advised interested companies of this filing by telegram dated May 31, 1934 and by letter on June 1, 1934 (Com. Exs. 164 J; 164 N). On a destination cost basis, these prices were 59 cents lower than the commercial price at Wiota at that time and were met by other bidders. The current commercial price at Wiota, Montana at that time was $3.34 in bulk (Com. Ex. 874 L).

16. With reference to Com. Ex. 178 A, exception is taken to the failure to report the following:

This exhibit refers to bids received by the United States Engineers on January 18, 1935, for the delivery of 1,200,000 barrels of cement for the Tygart River Project, near Grafton, West Virginia (Com. Ex. 178 A). The invitation required bidders to conform to their Code of Fair Competition. Pursuant to the NRA Cement Code, Alpha filed a price with the Code Authority which in turn notified other companies. The price filed by Alpha was $1.84 and it was met by the other bidders, including Lehigh (Tr. 24258-59; Resp. Exs. 810; 811; Tr. 27818; 28982; 28990-92).

17. With reference to Com. Ex. 175 A, exception is taken to the failure to report the following:

This exhibit refers to bids received by the United States Engineers on April 23, 1936, for 6,000 barrels of cement for delivery at Newkirk, New Mexico. The invitation stated that bids would be compared on the basis of the ultimate delivered cost to the Government at Newkirk (Com. Ex. 175 E). The price bid by Lehigh reflected the currently existing base at Humboldt of $2.10 and a land grant rate of $1.186854 (Com. Exs. 1031-10J, for id.).

18. With reference to Com. Ex. 373 A, exception is taken to the failure to report the following:

This exhibit refers to bids received by the United States Industrial Reformatory, Chillicothe, Ohio on June 12, 1936, for 500 barrels of cement. The invitation requested bids f.o.b. Chillicothe (Com. Ex. 373 B). The price bid by Lehigh was the current market price at Chillicothe (Tr. 27866-67; Resp. Exs. 742-43; Tr. 29022-25; 29409-10; Resp. Exs. 1861 for id.; 1866 for id.; Tr. 29762-63; Resp. Exs. 2335 B, D; 2335 A, E for id.; Tr. 32303-04; 37924; Resp. Exs. 2885 A-H).

19. With reference to Com. Ex. 303 D, exception is taken to the failure to report the following:

This exhibit refers to bids received by the United States Army on September 8, 1936 at Fort George Meade, Maryland, for 232 barrels of cement. The price bid by Lehigh was the current commercial price at that destination (Tr. 24042-43).

20. With reference to Com. Exs. 373 A; 303 D; 2496; 2498; 2595; 2507 and 2506, exception is taken to the failure to report the following:

Delivery in each case was requested f.o.b. destinations which were located in areas served by various Lehigh mills. Lehigh keeps a card record of delivered prices for each destination where Lehigh quotes and sells cement and Lehigh quoted its prevailing destination price for each destination involved (Resp. Ex. 3182 C; Com. Ex. 373 B; Resp. Exs. 3685; 3684; 3675; 3678; 3682; Tr. 26591-92; 26657; 27062; 27083).

21. With reference to Com. Ex. 189, exception is taken to the failure to report the following:

This exhibit refers to bids received by the United States Engineers on August 30, 1937 for 1200 barrels of cement for delivery at Monroe, Louisiana. The delivered price bid by Lehigh was the current market price at Monroe (Resp. Exs. 897; 859; 3047 for id.). The destination cost bid made by Lehigh included the lowest laid grant freight

rates furnished by the L & N Railroad (Tr. 25336-37; Resp. Exs. 897; 2284 A; Tr. 31894-95; Resp. Exs. 3046 B; 3047 for id.) after all fractions had been dropped, following a practice initiated by Signal Mountain in February 1937 (Tr. 25333; Resp. Ex. 896).

22. Exception is taken to the failure to report that the Lehigh Company has submitted numerous f.o.b. mill bids which did not include any control or qualifying clauses (Com. Exs. 1876; 773; 185; 776; 779; 781; 1875 A; 1098; 784; 1863; 112 D; 1886; 1099 B; 1099 C; 790 B; 397; 792; Resp. Ex. 2705).

23. Exception is taken to the failure to report that early in NRA period Lehigh adopted the so-called "control clause" which a competitor filed with his prices with the Code Authority (Tr. 27071).

24. Exception is taken to the failure to report the following:

On sales of cement in which land grant rates were involved, Lehigh has always quoted the United States Government in a manner which would permit it to take title to the material at the point of shipment in order that it could avail itself of land grant rates (Tr. 27066-67; see also f.o.b. mill bids listed in Exception 22, *supra*).

Lehigh has always had a regular practice of securing land-grant rate information from government publications and from railroad traffic departments for use in preparing bids which involved land grant rates (Tr. 27040-43; Resp. Exs. 1318-48).

As to The Cement Institute:

25. Exception is taken to the failure to report the following:

The statistical service provided by The Cement Institute supplies valuable trade information to Lehigh. Lehigh also subscribes to all other statistical services which furnish information regarding the construction business (Tr. 26993-94). These statistics are used solely in estimating future sales volume in order that production schedules may be intelligently adjusted (Tr. 26992-93; see also Tr. 26973-77; 26983-91).

The freight rate books of The Cement Institute provide Lehigh with the same kind of information that was supplied by Lehigh's own rate books before the Institute books were not available. Lehigh has found that they supply accurate freight rate information in a form simple enough to be used by an ordinary layman as well as a traffic expert (Tr. 26998; 27001; see also Tr. 26995-27001).

Lehigh made no use of the Compendium issued by the Cement Institute (Tr. 27004).

Lehigh attempted to observe the provisions of the NRA Cement Code immediately after the *Schechter* decision because it was requested so to do by the NRA Administrator (Tr. 27004).

Lehigh never regarded The Cement Institute or the Trade Practice Committee as a formulator of policy with regard to prices, conditions of sale, or any practices. Lehigh has never had any agreement or understanding with any members of The Cement Institute or any of its committees concerning any matters relating to its sale of cement (Tr. 27007-08).

26. Exception is taken to the implication that Lehigh representatives attended the meetings referred to in Com. Ex. 45 A and Com. Exs. 1496 A-C on the ground it is not supported by the evidence.

Paragraph 42

(*Medusa*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Medusa Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Medusa is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 42 that the acts and practices of Medusa were adopted or used pursuant to any agreement or understanding because it is contrary to the evidence as shown below.

4. Exception is taken to the failure to report that four responsible executives of Medusa (the Executive Vice-President and Treasurer, the Vice-President, the Secretary and the Traffic Manager) were called as witnesses and testified at length concerning the origin and development of the various practices and policies of the Medusa Company at issue including the subjects referred to in Paragraph 42 of the Report (Tr. 40018-682; 41049; 30865; 31435; 11458-602; 10801-29; 40694-1450). Other executives of the company, some of whom are referred to in references included in the Report, namely, E. J. McGuire, former Vice-President, W. B. Newberry, former Assistant Manager, A. St. John Newberry, S. B. Newberry, former President and General Manager, were unavailable for testimony on behalf of Medusa because they were dead at the time of the issuance of the complaint. (Tr. 40097; 47975; Resp. Ex. 3753).

5. Exception is taken to the erroneous statement that Medusa was organized in 1900. The evidence shows that the company was organized in 1916 (Tr. 40022).

6. Exception is taken to the erroneous statement that Medusa operates a plant at Manitowoc, Wisconsin. The evidence shows that it is operated by the Manitowoc Portland Cement Company (Tr. 40025).

7. Exception is taken to the failure to report the following evidence regarding Medusa's operations and marketing area:

Medusa is not affiliated with any cement manufacturing company (Tr. 40022). It markets cement throughout the area bounded by Baltimore on the east, eastern Iowa and

Minnesota on the west and the northern part of North Carolina on the south. Medusa does not sell standard Portland cement in New England or New York (Tr. 40039-40; 40074). The present capacity of Medusa's mills is the result of increases which were necessary to take care of the demand which existed from 1926-29 (Tr. 40030). The company's mills are efficient and modern (Tr. 40031).

The evidence shows that Medusa has never had any agreement to restrict its production to 70% of capacity and has never restricted its production to 70% of capacity in any year; nor has the company ever operated pursuant to any plan of sharing business (Tr. 40085; 40098).

8. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of Medusa:

Medusa usually quotes and sells at delivered prices because all purchasers (including the U. S. Government) buy cement on the basis of what it costs laid down at the point of use, and ordinarily ask for delivered prices. Medusa has found that the competition it must meet is at the point of use (Tr. 40056-58). Medusa has no policy against making f.o.b. mill sales however (Tr. 40059; 40610) and has quoted f.o.b. mill prices (Tr. 40272; 40275; 40284; 40359; 40399; 47673; Resp. Exs. 3166; 3167; 3168; 3178; 3179; 3180; 3183-Z8). Moreover, Medusa makes sales to any customer f.o.b. its silos or warehouses at Milwaukee, Chicago, Cleveland, Pittsburgh and Grand Rapids (Tr. 40037; 40039).

Medusa attempts to sell its cement for as high a price as it is able to obtain, but it cannot sell cement at a price higher than that of any single competitor. When competitors have quoted prices lower than Medusa, the company has found its regular customers have always given it a chance to meet such lower prices (Tr. 40052; 40045-46).

Where there has appeared to be a competitive advantage available to Medusa if it were to use a base at any of its mills, the company has quoted prices reflecting such a base, and in so doing has attempted to keep prices low enough so as to discourage distant mills from invading markets near the Medusa mills (Tr. 40052-56).

Medusa has found prices which reflect or appear to reflect some pattern and at other times has found prices which have not had or appeared to have any pattern. The company discovers the existence or non-existence of a pattern in competitive prices by checking through its salesmen and customers the destination prices in a given area (Tr. 40046-50). Prices for cement vary frequently at destination and such variations in destination prices are not caused by changes in freight rates or any so-called base prices (Resp. Exs. 3193 A-Z2).

By analyzing delivered prices found Medusa has discovered that the number and location of basing points has varied from time to time. Medusa obtains its information concerning competitors' prices from the consuming trade and not from its competitors. It has found that customers are a prompt source of price information and that they are well informed regarding prices and market conditions at all times (Tr. 40042-45; 40062-63). The company itself keeps on file its prices at each destination where it sells cement and uses this file in making sales, quotations or bids until a change is made. On the occasion of any change in price Medusa checks the reported changes at all of its important markets (Tr. 40064-65; 40044; 40046).

The evidence on behalf of Medusa shows that the company has always been free to quote any price it sees fit to quote; that it has had no agreement or understanding with any respondent regarding its prices or the status of its mills as base or non-base mills; that neither the Institute nor any competitor has attempted to influence Medusa's action regarding prices or price changes (Tr. 40056; 40053; 40060; 40610).

Medusa has found that competitors often sell cement at secret or special prices lower than their regular published prices and the Medusa Company has also made sales at such prices. It has found, however, that reductions in the price of cement have not increased its volume of business (Tr. 40063-64; 40520; 40061-62).

Medusa on one occasion attempted to increase its prices in the Cleveland area, but this increase was not followed by competitors and was not effective (Tr. 40056); Medusa has initiated price reductions (Tr. 40052).

A large volume of Medusa's cement has always been sold freight prepaid (Tr. 40342). On such sales where the customer has paid the freight charges, Medusa considers that the customer is paying a portion of the price of the cement in so doing and the payment of freight charges is made for Medusa's account. Likewise in any case Medusa has always taken care of claims for damage or loss in transit (Tr. 40068-69; Resp. Exs. 3157 E, G, I; Tr. 40798-800; Resp. Exs. 3220 A, B; Tr. 40414).

9. Exception is taken to the failure to report the following evidence regarding bids submitted by Medusa:

It is the practice of Medusa usually to bid its current commercial prices on all government work. It has not found the Government a better customer than its regular commercial customers and any special consideration given to the Government has always been promptly demanded by its other customers (Tr. 40059-60).

Medusa has submitted f.o.b. mill bids to the Federal Government on request and the evidence shows that the company has had no agreement or understanding to refuse to bid f.o.b. mill. (Tr. 40359; 40362; 40364-65; 40370-71; 40399; 40610; Com. Exs. 766; 767; 782; 787; 790; 193; Resp. Exs. 3178; 3179; 3180; 1074; 3166; 3167; 3168).

The evidence also shows that Medusa has submitted several bids where its prices were not identical with the prices bid by competitors (Com. Exs. 787; 1846; 1886; 2818; Resp. Exs. 1011; 4012).

10. Exception is taken to the failure to report the following evidence regarding the practices and policies of the Medusa Company with respect to sales to dealers and direct sales:

Medusa's dealer policy broadly stated is to sell to dealers in all cases where dealer service is required and to sell direct where such service is not required. The dealers are Medusa's most important customers and about 80% of the company's shipments are to dealers. This importance of the dealer has had a tremendous influence on the marketing practices and policies adopted and pursued by Medusa (Tr. 40065; 40068; Resp. Ex. 3067).

For 30 years the Medusa Company and its predecessor companies have operated in accordance with the concept that its dealers be persons to whom the consuming public naturally looks in buying cement and other building materials. This concept is, therefore, variable and depends upon local business conditions (Tr. 40067). Membership in a dealer association has never been a factor considered by Medusa in selecting its dealers (Tr. 40067-68).

On two occasions, both in 1935, Medusa published a statement of its policy regarding the kind of business it would sell direct and the kind of business it would sell through dealers. Both such policies were announced in response to requests by customers for a definite statement of policy. In each instance also Medusa found that a competitor had announced a definite policy to its trade and Medusa's statement of policy followed the policy expressed in the competitor's announcement (Tr. 40065-66).

The evidence shows that Medusa did not participate in any meetings in 1935 where the subject of dealer policies was discussed and that the company did not adopt or use either of its policies as the result of any understanding or agreement with any competitor (Tr. 40107; 40392-93; 40066-67).

The evidence also shows that Medusa has not since 1935 strictly adhered to its announcement of policy but has varied its practice depending upon existing competitive conditions (Tr. 40183-85; 40466-68; Resp. Ex. 3158 E; Tr. 40183; Resp. Exs. 2317; 2318). Further evidence to show such variation in the company's practice was rejected by the Examiner (Resp. Exs. 1888 id.; 3111 A-B id.).

11. Exception is taken to the failure to report the evidence showing the following regarding truck and water delivery by Medusa:

Medusa started to allow trucking in 1919. It continued in a limited manner until 1929. Beginning in 1929 Medusa extended its trucking facilities to meet the service offered by some competitors (Tr. 40070). At many places, when Medusa loaded trucks, its dealers complained. In 1932 Medusa found a competitor had announced a policy of trucking by contract trucker. Medusa announced a similar

service and found that its dealers had less objection to this method of trucking (Tr. 40071-72). Medusa has many contracts with contract truckers (Resp. Exs. 3295; 3299; 3300; 3302; 3311; 3312; 3313; 3315; 3324; 3325).

It has been Medusa's experience that deliveries either to dealers' trucks or by contract truckers is not as satisfactory from the point of view of economic plant operation as rail deliveries and that truck delivery is neither cheaper nor quicker than rail delivery. Medusa has, therefore, used rail deliveries except where it finds it is necessary to meet the competition of trucks as employed by its competitors (Tr. 40069; 41163; Resp. Ex. 3354). In many localities its dealer customers request only rail shipments (Tr. 40069).

Medusa delivers to customers' trucks at a silo price without restriction at its Milwaukee and Chicago silos and the mill at Manitowoc (Tr. 40034; Resp. Ex. 3142; Tr. 40035; Resp. Exs. 3183-Z8; 3325). It has made many expensive changes in its Baybridge mill in order to facilitate truck loading (Tr. 41024). The company delivers cement by truck to Cleveland (Tr. 40036-37; Resp. Ex. 3547) and while it had warehouses in Cleveland, Grand Rapids and Pittsburgh, delivery was made to dealers' trucks at those warehouses (Tr. 40037; 40039). The Pittsburgh warehouse was discontinued because it was too expensive (Tr. 40664-65; Resp. Exs. 3188; 3189; 3190; 3191; 3192; 3193; 3194).

In Ohio, as much Medusa cement moved by truck in 1937 as in 1931 (Tr. 41018).

Medusa never discontinued trucking at all its mills and the company has not had any agreement with any competitor to discontinue trucking at any point (Tr. 31033; 31049; 41200; 40219-20; 40467-71; Resp. Exs. 3155 A-H).

Cement truckers must file their rates with the State Public Service Commission in Ohio (Tr. 41029; Motor Vehicles Laws of Ohio §614-103 and Administrative Order No. 119, Tr. 41037; 41045-46), in Michigan (Tr. 41044), and in Wisconsin (Tr. 41047). The trucking rates in Michigan are the same as rail rates (Tr. 41044-45). In Wisconsin they are higher than rail rates (Tr. 41046). The trucking rates in Ohio and Wisconsin are higher than in Michigan (Tr. 41051; 41057). The Medusa trucking rate from Baybridge to Cleveland is higher than the rail rate (Tr. 41441-42). In

Wisconsin the State Public Service Commission has restricted trucking to 65 miles. Medusa has objected to this (Tr. 41084-85).

For many years Medusa has shipped a large volume by water on the Great Lakes and some on the Mississippi and Ohio Rivers (Resp. Ex. 3224). It supplies some of its silos or distributing points by boat on the Great Lakes (Tr. 40033; 40038; 40072-73) and has also sold cement for water delivery. In such instances there was no saving as compared with rail delivery (Tr. 40073).

12. Exception is taken to the failure to report the following evidence regarding the efforts of Medusa to secure lower short haul rates:

In 1923 the I.C.C. established a rate scale in Docket 12710 in Illinois which favored long haul shipments and the railroads extended the scale to the Midwest area east of the Mississippi River (Tr. 40830-31; 40850-51; 40847; Resp. Exs. 3230; 3232; 3252; 3258). At that time there were only five mills in Ohio (Tr. 40832-34). By 1931 there were ten mills and four packing plants within Ohio, and six mills on the eastern borders (Resp. Ex. 3235). Medusa became interested in lower short haul rates because it had increased the number of its mills and because of the new plants in the Ohio area (Tr. 40851) and it has attempted to secure lower short haul rates to improve its competitive position (Tr. 40828).

In 1927 Medusa (then Sandusky) asked to have the short haul rates reduced (Tr. 40834-38). Another application was made in 1929 (Tr. 40840-41). Another application was was in 1930 (Tr. 40842). These applications all failed (Tr. 40836; 40846). Early in 1931, however, several railroads indicated to Medusa, without Medusa asking, that they had become favorable to short haul rates because they wanted to regain business lost to truck transportation (Tr. 40864-68; Resp. Exs. 3238; 3239; 3240; 3241; 3242; 3243). (In 1931 the I.C.C. in *Ex Parte* 103, [178 I.C.C. 539] suggested that short haul rates were too high for the railroads to compete with trucks.) The railroads advised Medusa that the concurrence of the other cement shippers was necessary because the same yardstick was used in measuring the rates from all producing points (Tr. 40871-72; 40880-81).

Medusa believed that reduced short haul rates would result in a saving to Medusa, and would favor it as against the long haul shippers, particularly at its Ohio mills (Tr. 40868-69; 41173; 40940; 41151). Accordingly, Medusa made another attempt to secure a reduction in short haul rates in the Midwest area (Tr. 40846) but made its approach through the railroads because they were able to change the scale without an I.C.C. order since the scale had been put in voluntarily by the railroads (Tr. 40850-51; Resp. Exs. 3252; 3253; 3254; 3258).

Medusa used the argument concerning trucking in its application solely because that was the matter the railroads were interested in (Tr. 40880-81; 40883; 41168). The meetings between carriers and interested shippers which resulted were a part of the procedure recommended and approved by the I.C.C. in the solution of rate problems. The I.C.C. discourages the filing of formal complaints in hearing rate cases (Tr. 40876-79. See 39th Annual Report of I.C.C., especially at pps. 42-43).

Several shippers opposed the reduction in short haul rates and no agreement was ever reached between the shippers (Tr. 40964-65). The rates were never revised in 1931 or later (Tr. 40902; 40968; 40970; 40983).

Medusa continued its efforts to secure the reduction of short haul rates after April 1932 (Tr. 40910; Resp. Exs. 3269; 3270; 3271; 3275; 3277; 3279; 3280; 3282; 3284; Tr. 40966; 40985).

The evidence showed that there was no agreement that any bases should be eliminated if the short haul rates were adopted (Tr. 40941).

13. Exception is taken to the failure to report that the evidence shows the following regarding Medusa's membership in The Cement Institute:

The Institute has never interfered with competitive conditions as far as Medusa was concerned (Tr. 40060-61). Medusa never used the Compendium (Tr. 40190).

Medusa receives statistics from the Institute and uses them as means of keeping track of general trends (Tr. 40074).

MacFarland, as president of the Institute, never asked Cole (Medusa) to contact the railroads in order to curtail trucking (Tr. 40883-84; 40915). Since 1930 MacFarland has been in charge of Medusa's white cement sales and has not been connected with the sale of standard Portland cement (Tr. 41328-29).

The Code Authority never advised Medusa what prices to file. Medusa filed its price at each point, or met the filed price of a competitor if it was lower than Medusa's price (Tr. 40061; 40075).

In 1922 Medusa (then called Sandusky) compiled its own freight rate books from the railroad tariffs. This took six persons in the traffic department for the two mills (Tr. 40715-16). Medusa also kept a card file of rates from various plants to destinations in its market area. This has been kept up to date since 1922 (Tr. 40721; Resp. Exs. 3201 A, B). Medusa now receives Institute rate books for some 30 states and uses them even in states where it doesn't sell standard Portland cement as a source of rate information covering various specialty products which have the same freight rates as Portland cement (Tr. 40726-27). The Institute rate books have eliminated the necessity of preparing its own rate books (Tr. 40722; 40726; Resp. Exs. 3200 A, D for id.) and have resulted in a substantial saving to it, amounting to about $8,000 per year (Tr. 40744-45). Medusa's traffic department is now smaller than it was in 1925, even though Medusa has four more cement plants and several silos and warehouses (Tr. 40722). Medusa paid the Institute in 1936, $2,200 to $2,300 for the freight rate service (Tr. 40701). It would cost Medusa over $10,000 to carry on the work necessary to secure all the rate information it needs (Tr. 40744-45). If Medusa did not use the Institute rate books or a similar compilation, it would have to refer to some 46 agency and 181 individual tariffs and their supplements (Tr. 40745-46; Resp. Exs. 3207 A, G).

Medusa's traffic department finds the Institute rate books to be the most readily available source of information to find the lowest rate from point of origin to destination (Tr. 40744).

Medusa checks the freight rates published by the Institute constantly and has found few errors (Tr. 40759-60;

41381-83). Those found were never at destinations where Medusa sold as much as four or five carloads a year (Tr. 40760). In the case of an error in the Institute rate book, Medusa uses the official tariff rate (Tr. 40760-61). The evidence shows that Medusa has not had any agreement not to use a new rate or correct rate until it is promulgated by the Institute, or to use the Institute rate rather than the official railroad rate (Tr. 40796-97).

Medusa does not wait for notice from the Institute of a change in freight rate before using a new freight rate (Tr. 40759).

It keeps up to date on rate changes by receiving tariff supplements and an independent special daily service covering cement rates from transportation experts in Washington (Tr. 40757-58). Each change in freight rates is immediately called to the attention of its sales and accounting departments (Tr. 40758-59; 40766-68).

Medusa does not find that the Institute rate books are of less use to them because they do not indicate what carriers participate in the rates included in the books (Tr. 40749-50) or because they have no status before the I.C.C. (Tr. 40751-52) or because the basic minimum weight is not shown (Tr. 40753), or because they do not state on their face that they quote the lowest rates (Tr. 40756). Medusa uses the Institute rate books in making out bills of lading. They are sufficient to secure the lowest available rate which is the only information needed (Tr. 40756). It is not necessary for a shipper to indicate on a bill of lading whether the destination is a prepay station (Tr. 40756-57), or to show routing (Tr. 40750). When a carrier receives a bill of lading without the route, the carrier is under the duty to route it via some route that would cover the rate inserted in the bill of lading or to advise the shipper if there is no such route (Tr. 40750).

In 1925 Medusa prepared from the official tariffs route information on cement shipments (Tr. 40725; Resp. Ex. 3202) and keeps a file of route cards which show all of the available routes and rates to all destinations in the territory where Medusa solicits business (Tr. 40727-28; Resp. Exs. 3203 A, D).

Medusa inserts route information in its bills of lading from these cards, although it is not necessary to do so to secure the lowest rate if the rate is inserted (Tr. 40729-30). The route is inserted solely for the purpose of securing prompt delivery (Tr. 40730; 40741; 40730-32; Resp. Ex. 3204).

The rates by the various routes are almost invariably the same and in some states there are no routes over which a different rate applies (Tr. 40728-29).

14. Exception is taken to the failure to report regarding Medusa's policies as to foreign cement, that Medusa has never maintained a stock of cement at Brooklyn (Tr. 40073); has never refused to sell a dealer because the dealer was handling foreign cement (Tr. 40073); has never solicited business on gray Portland cement in Boston (Tr. 40074).

15. Exception is taken to the failure to report that Medusa began to stamp bills of lading with a no diversion stamp on May 17, 1935 (Tr. 41102; Resp. Ex. 3331). It learned of the use of such a stamp from the New York Central Railroad (Tr. 41103). The evidence shows that Medusa did not adopt the practice of stamping its bills of lading as the result of agreement with any competitor (Tr. 41105) and has not discussed such a stamp with representatives of other cement companies (Tr. 41357; 41356; 41359).

16. Exception is taken to the failure to report that Com. Exs. 20 and 1496 A-C (cited in Paragraph 42) occurred during the existence of and concerned the NRA Code period (Tr. 982; 38826; 38782).

Com. Ex. 1374 and Tr. 11529-33 (cited in Paragraph 42) do not have any bearing on Medusa.

Paragraph 43

(*Missouri*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Missouri Portland Cement Company is "identified" or connected

by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Missouri is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the President of Missouri Portland Cement Company appeared as a witness on its behalf and testified fully regarding the practices and policies of the company as well as their history and development. This testimony was directed to the charges in the complaint as well as to evidence offered by Commission's counsel affecting Missouri and included all subjects referred to in Paragraph 43 of the Report (Tr. 37085, *et seq.*; see more specifically below).

4. Exception is taken to the failure to report the following evidence regarding the location and organization of Missouri Portland Cement Company:

Missouri maintains sales offices at St. Louis and Kansas City, Missouri and at Memphis, Tennessee. It operates no silos or warehouses. The company is not a parent, subsidiary or affiliate of any other cement producing or selling company. None of its officers or directors are connected with any other cement company (Tr. 37087; 37124).

The annual capacities of Missouri's Prospect Hill and Sugar Creek plants are, respectively, about 3,250,000 bbls. and 4,250,000 bbls. These figures are based on the company's experience as to what the plants can actually produce. Missouri has never consulted with W. S. Mallory with regard to the capacity of its plants, nor has it ever furnished The Cement Institute with information concerning the capacity of its plants (Tr. 37175-77; 37182; 37184).

In determining the rate at which to operate its plants, Missouri takes into account the amount of unshipped business on its books and the general construction activity in its territory. The company has found that consumption in its marketing territory fluctuates considerably from time to time and from place to place, and consequently it concentrates its solicitation of business in areas where current consumption is good. During the past six or seven years, the Prospect Hill plant, with the exception of one four months period, has operated at a high percentage of its capacity. During this same period, however, the Sugar Creek plant has been able to operate for only eight or nine months of the year. Missouri has no definite policy with regard to shutdowns, except that it shuts down a plant whenever its rage capacity is full. Storage capacities at its Prospect Hill and Sugar Creek plants are, respectively, about 450,000 bbls. and 225,000 bbls. (Tr. 37184-86; 37188; 37195-206; Resp. Exs. 2794 A-D).

Missouri has never adjusted its rate of production to any set percentage of its capacity and the evidence is that the company has never had any understanding or agreement with any of its competitors with regard to any curtailment of production or shipments, nor has it ever had any understanding or agreement to allocate business or sales territory or to trade orders with competitors. (Tr. 37182-83; 37191-93; 37206; 37212; 372329; Resp. Exs. 2794 A-D).

In the eight years prior to July 1, 1937 Missouri made improvements at its mills costing over $2,500,000 (Tr. 37086-87; 37177; 37182; 37186-87). Evidence as to the effect of these improvements on Missouri's costs of production was rejected by the Trial Examiner (Tr. 37324).

Missouri normally sells and ships its product into the States of Missouri, Kansas and Illinois and into some parts of the States of Iowa, Nebraska, Oklahoma, Arkansas, Mississippi, Tennessee, Kentucky and Indiana; in these territories Missouri comes into competition with the mills of eighteen separate and independent cement companies, including the non-respondent Louisville Cement Company.

In any one market Missouri finds itself in competition with at least ten competitors (Tr. 37124-26).

The area in which Missouri solicits business fluctuates depending upon current prices, shifting of consumption, and the ability of the company to give the service which will permit it to secure business. There is no fixed area to which the company confines its solicitation, and there have been many changes in that area as a result of the three factors referred to (Tr. 37126-27; 37195-96).

5. Exception is taken to the failure to report the following evidence regarding Missouri's membership in the Institute:

The company's practices and policies have not been influenced or affected in any way by its membership in the Institute, nor has the Institute or its Board of Trustees ever attempted to influence the company's policies or practices. The President of Missouri has served as a member of the Institute Board of Trustees. His testimony shows that there was no discussion at any meetings of the Board of Trustees regarding marketing policies and prices (Tr. 37157; 37217; 37218-22; 37331).

Missouri has always found it essential to the operation of its business to have accurate freight rate information quickly available. The company has therefore always compiled its own freight rate books from official railroad tariffs and has always kept them up to date by the same means. As a member of The Cement Institute, Missouri received some of the freight rate books issued by the Institute. Missouri has never used the Institute freight rate books for any purpose other than occasionally checking its own freight rate compilations. Missouri never exchanged freight rate information with any competitor; it has never had any understanding or agreement with the Institute or with any competitor regarding the use either of its own or of the Institute rate books (Tr. 37313-16; 37331-50; 37355-56; Resp. Exs. 3798-99).

Missouri received the contract reporting service of the Institute when that service was in operation. Missouri considered the service of value as a means of ascertaining

the actual extent of the future commitments appearing on its books. When Missouri discovered that one of its contracts was duplicated or padded, it determined itself the subsequent action it would take. Neither The Cement Institute nor any competitor had anything to do with Missouri's decision in this regard (Tr. 37185; 37218; 37239-43).

6. Exception is taken to the failure to report the following evidence regarding Missouri's bidding practices and policies:

It has always been the company's general practice to quote governmental agencies, state and federal, its current commercial destination prices except in those instances where land grant rates or special rates are available to the federal government and f.o.b. mill prices are requested. Missouri has bid many prices to federal and state agencies which were not identical with prices of competitors (Tr. 37289-94; 37370-74; Resp. Exs. 1001 A-C; 2349-Z3-Z4; 2350 P; 2351-Z1; Com. Exs. 187 A; 188 B; 769; 783; 788; 790; 791; 1863; 1884; 1885; 1886; 1887; 2440; 2441; 2444; 2450-T13). Missouri has quoted f.o.b. mill prices to government agencies when requested to do so without using any "control clause" or other qualifying clause (Resp. Exs. 990 A-B; 993 A-B; 1001 A-C; 2349-Z3-Z4; 2350 P; 2351-Z1; Com. Exs. 182; 183 F; 187 A-L; 188 B; 767 A-B; 769; 772; 776; 779; 780; 781; 783; 788; 790; 791; 1884; 1885; 1886; 1887; 1888; 1889; 1890; 1891; Tr. 3519-22; 3524-25; 3530-31). On some bids to the federal government after the early part of 1934 Missouri used the so-called "control clause" which enabled the government to arrive at an f.o.b. mill price for invoicing purposes. Missouri learned of this clause from a Code Authority notification of prices filed by some members of the industry and independently adopted it (Com. Exs. 171 A-B; 173; 366 B; 870; 1088; Tr. 37129).

In every case where land grant or special rates were available to the government it has always been Missouri's policy to quote prices which gave the government the benefit of the available land grant or special rates and at the same time to attempt to make its price competitive with

the lowest destination cost which might be available from competitive mills (Tr. 37128; 37129).

Missouri has always secured the land grant rate information it uses in connection with bids to the federal government from railroads and from tabulations of government bids taken previously at the same points. The company has never had any contact with any competitor with regard to land grant rates and has never received land grant rate information from any competitor. Missouri never filed land grant rate information with The Cement Institute, nor did it ever request any such information from the Institute (Tr. 37128-29).

Missouri has never had any contacts or agreements with any competitor in regard to bidding on public lettings, or the method of bidding, or the prices to be bid (Tr. 37129; 37277-80). The company never filed prices with The Cement Institute or its Trade Practice Committee (Tr. 37221-22; 37429-30).

Missouri's sales to the federal government since 1930 have amounted to less than ¾ of 1% of its total sales (Resp. Ex. 2795; Tr. 37128; 37238).

7. Exception is taken to the failure to report that on Com. Ex. 1088 (cited in Par. 43) Missouri bid the current commercial prices at the destinations involved (Resp. Exs. 968-73). The land grant rates used on this letting were furnished on request by the railroads (Resp. Exs. 962-67).

8. Exception is taken to the failure to report the following evidence regarding the pricing practices of the Missouri company:

Missouri's commercial customers and government agencies, with relatively few exceptions have always requested quotations f.o.b. the point of delivery and even the government, where requesting f.o.b. mill prices, always buys on the basis of the lowest laid down cost at the point of use. Accordingly, Missouri since 1915 at least, has ordinarily sold at delivered prices, and always with a view to meeting the competition at the point of use (Tr. 37121; 37167-69; 37172; 37174-75; 37087-88). Documentary evidence and testimony to this effect was rejected by the Trial Examiner (Resp. Exs. 3793 A-L for id.; Tr. 37171-72).

In some of its markets Missouri has quoted prices by setting a base figure at its mills and adding the rail freight to destination. But, in any case, it has met any prices it found which were lower, regardless of whether or not such prices reflected a base. The company has always been free to decide the status of its own mills as well as the base figure it would use (Tr. 37122-23).

Missouri ascertains what prices its competitors are quoting from information received from its customers, from tabulation of bids, and from its salesmen who operate under instructions to report all information they find in the field concerning competitive prices and practices. In this way Missouri learns of competitive price changes almost as soon as they take place. Other than these sources, Missouri has no source of information concerning competitive action. In case of a price reduction, the company meets the new prices immediately or must forego the business. If the change is a price increase, Missouri decides independently whether or not to follow (Tr. 37118-20; 37122-23).

On the occasion of any change in price, Missouri analyzes all competitive price information it receives to determine whether the prices reflect any pattern or any base figure at a competitor's mill and if they appear to do so, will ordinarily act accordingly in meeting competition. Missouri has no assurance that any price it quotes will meet the lowest price quoted. Missouri has found that the prices sometimes reflect a base figure at one mill; sometimes at another and many times no base at all. Missouri meets the lowest quoted prices it can find, whether or not they reflect any base (Tr. 37120; 37122-23; 37309-11).

Missouri has never received any information from competitors with regard to prices or mill bases in the form of lists or otherwise, nor has it ever supplied any competitor with any such information. The company has never had any discussions with competitors concerning mill bases or prices (Tr. 37122-23; 37310).

The evidence shows that Missouri has never had any understandings or agreements with anyone with regard to the establishment or maintenance of any mill as a base mill

or as to the amount of the mill base at any mill (Tr. 37123), and that it has never had any agreement or understanding with anyone to quote destination prices or to quote any particular prices (Tr. 37122-23; 37167-69; 37221-22).

At times of price changes Missouri sends new quotations to all of its dealer customers and prospective customers. Missouri maintains and keeps up to date a card system which shows the prices it is currently quoting at each destination. In the sales department these cards are used in quoting prices from day to day (Tr. 37120; 37351; 37352-53). The Trial Examiner rejected further evidence (Resp. Exs. 2811-15 for id.; Tr. 37353-55).

Missouri has found secret concessions both as to prices and as to terms occurring continually in the area in which the company sells. This has been so during the entire period from 1930 to 1937. Missouri has met these lower and secret prices where it learned of them, particularly when good customers were involved. Further evidence to show the nature and extent of prices quoted by Missouri lower than its published prices was rejected by the Trial Examiner. The company has quoted prices lower than its published prices on State Highway business in an effort to obtain larger awards. Such efforts were unsuccessful, however, because the Highway Commission after the bids were opened permitted competitors to meet the lower Missouri quotations (Tr. 37328-29; 37287-88; 37324-28; 37365-66; 37386-90; 37461-63; Com. Ex. 2439-40; Tr. 37289-94; 37294-303).

After Missouri had quoted lower prices to the Missouri Highway Department in 1931 and in turn reduced its regular commercial prices successively in proportion to the special prices given to the State, the company found that it had lost a million dollars without having increased its business (Tr. 37292-94). The Trial Examiner rejected further evidence (Tr. 37294-302). Accordingly, in 1932 Missouri initiated price increases to avoid further losses. These increases were not met immediately by competitors but within 10 or 15 days other competitors did quote higher prices in response to the leadership of Missouri. The presi-

dent of Missouri testified that there was no consultation with any competitors before or during the operation of this price increase (Tr. 37304-06).

In April of 1933 Missouri did not follow a further attempt to increase prices initiated by the Lone Star Company because a study of the market revealed that other competitors were not meeting this advance and Missouri believed it would not be effective. In July of 1933, however, when Lone Star again attempted to increase prices Missouri did follow the increase independently (Tr. 37306-09).

Missouri's invoices to its customers have always carried the full delivered price and the company has always carried the full delivered price on its ledger sheets (Tr. 37088; 37096-98; 37088-89; 37150; Resp. Exs. 2789 A-M; 2790; 2791; 2792 A-X2). It made no change in any of its accounting practices as a result of receipt of the Manual of Cost Accounting distributed by the NRA Code Authority during the Code period (Tr. 37165-66).

Prior to July 1, 1937 Missouri prepaid freight on more than 50 per cent of its total business. Whether Missouri prepaid the freight depended on the desire of the customer (Tr. 37104; 37105; 37158-64; Resp. Exs. 2792 A-Z2; Com. Exs. 2726(1-102)). Further evidence as to payment of freight was offered and rejected (Tr. 37104).

9. Exception is taken to the failure to report any of the evidence regarding the practices and policies of the Missouri company with respect to dealers which shows the following:

Missouri makes about 80% of its total sales to dealers and considers them to be the primary outlet for its product. The company also sells its cement at dealer prices to the United States government, state governments and various other classes of customers. The qualifications Missouri requires of its dealers vary from place to place. Missouri has never maintained any fixed policy as to the classes of customers to whom it sells cement. Generally its criterion has been whether or not dealer service was required. Missouri's practices have frequently been different from those

indicated in competitors' announcements (Tr. 37134; 37213-17; 37238; 37255-77; 37406-13; Resp. Ex. 2795).

Missouri has never had any understanding or agreement with anyone as to who should be recognized as a dealer or as to classes of business it would quote direct (Tr. 37215-17; 37222; 37268; 37269-70; 37271-72). The Cement Institute has had nothing to do with the dealer policies of the Missouri Company (Tr. 37217; 37222).

10. Exception is taken to the failure to report the evidence that Missouri has at all times since 1934 made deliveries by water from its Prospect Hill plant to those customers who have requested such delivery; that sales delivered by water have constituted only a small percentage of the company's total sales; and that the cost of delivery by water from Prospect Hill has at all times exceeded the cost of delivery by rail (Tr. 37131-33).

11. Exception is taken to the failure to report that Missouri has never come into competition wtih imported cement and has never had any understanding or agreement with anyone with regard to competition with imported cement (Tr. 37127-28).

12. Exception is taken to the failure to report the evidence regarding the other policies and practices of the Missouri company at issue, and which shows that Missouri has never had any understanding or agreement with respondents concerning any of them. See: trucking of cement (Tr. 37130-31); diversions in transit (Tr. 37133-34); cement specifications and standardization (Tr. 37222; 37243-46); terms of sale and discount (Tr. 37284-88).

Paragraph 44

(Monarch)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Monarch Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Ar-

ticles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Monarch is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the vice-president and sales manager of Monarch who was in charge of its practices and policies appeared as a witness on its behalf and testified fully concerning the origin and development of the practices and policies of the company in issue, including all of the subjects referred to in Paragraph 44 (Tr. 42180-437; Resp. Exs. 3426-35) and that the evidence shows that Monarch's practices and policies have at all times been independently arrived at without understanding or agreement with any competitor (Tr. 42186-87; 42192; 42194-95; 42199; 42213; 42220-22; 42234; 42248; 42256; 42259; 42262; 42268-69; 42287; 42292-93; 42304-05; 42307; 42311; 42313; 42315; 42318; 42322; 42332; 42333; 42334-35; 42336; 42337).

4. Exception is further taken to the failure to report the following evidence concerning the organization of the Monarch Company, the history and location of its mill and the facts about the company generally:

After its incorporation in 1913, Monarch Cement Company purchased the plant at Humboldt, Kansas, which had been constructed by the Monarch Portland Cement Company. The latter company had been formed in 1907 and had begun producing and shipping cement from its Humboldt mill in September 1909. It continued in business until 1912 when it was dissolved (Tr. 42183).

The mill was located at Humboldt because of the availability of suitable raw materials at that point; because there was available there at the time at low cost natural gas which was suitable for fuel; and because of proximity

to good markets and readily available transportation facilities (Tr. 42183).

Monarch has always used every available means to improve the quality of its cement and the efficiency of its operation. The company has continually replaced obsolete machinery and equipment with modern, efficient machinery (Tr. 42183-85).

Monarch is a small company. Based on actual experience, it estimates the present finished cement capacity of its Humboldt mill at 1,500,000 barrels annually. In recent years demand for cement has been such that Monarch has been unable to operate all of its eight kilns continuously. In an effort to spread employment over as much of the year as possible, the company has attempted to operate 3 or 4 of its kilns continuously. The Monarch mill is the only source of volume employment in the town of Humboldt (Tr. 42185-86).

Monarch has never declined to manufacture cement according to any specification its customers desired and has never taken any steps to eliminate special specifications or to discourage the development of new or special types of specifications for cement (Tr. 42186-88).

In addition to its principal office at Humboldt, Monarch maintains branch sales offices at Tulsa and Oklahoma City, Oklahoma, at Kansas City, Missouri, at Wichita, Kansas, and at Omaha, Nebraska. It has no warehouses or silos other than those situated at its plant (Tr. 42183).

Monarch sells and ships its cement into the states of Kansas, Oklahoma, Nebraska, the northeastern part of Texas and the Texas Panhandle, the western half of Missouri, the northwestern corner of Arkansas, and parts of Louisiana, Iowa and New Mexico. It has made occasional shipments into Minnesota, South Dakota and Illinois to accommodate friendly contractors whom it serves in the territory in which it regularly solicits business (Tr. 42188; Resp. Ex. 3426).

In this area, Monarch regularly encounters the competition of 32 competitors and in any one market in that area, it usually encounters at least 10 competitors (Tr. 42188-89).

Owing to continually increasing competition in all parts of the area in which it solicits business, Monarch gradually increased its sales force from three salesmen in 1918 to 11 in 1937. These increases were made in an effort to keep competitors from securing business from Monarch customers and prospective customers; to enable Monarch to cover its sales area more frequently; and to secure more business. None of the increases in the size of its sales force was accompanied by any increase in the extent of the company's sales area. This area is smaller now than it was in 1918 (Tr. 42189-90).

Monarch has never had any agreement with any competitor to share business or to exchange shipments (Tr. 42220-23; 42315; Resp. Ex. 3426).

Monarch is not affiliated with any other cement producing or selling company (Tr. 42206).

5. Exception is further taken to the failure to report the following evidence concerning Monarch's membership in The Cement Institute:

Monarch rejoined the Institute in June 1933 because the Institute had been revived to handle preparation of an NRA Cement Code. No one connected with Monarch has ever been an officer of The Cement Institute or a member of the Code Authority (Tr. 42318).

Monarch has subscribed to the Institute's freight rate service ever since the service has been in existence. Prior to that time it subscribed to and used rate books published by independent agencies when such books were available. The company has found the Institute books to be convenient, economical and accurate compilations of the rate information it needs in the operation of its business. The cost of the service to Monarch is far less than what it would cost Monarch to compile its own books (Tr. 42196-98).

Monarch has never had any agreement to use rates shown in Institute books (Tr. 42293).

Monarch has always compiled and used its own conversion table and has never used conversion tables prepared by the Institute or any other outside agency (Resp. Ex. 3428; Tr. 42234-36).

The sales manager and vice-president of the Monarch Company testified that all of Monarch's policies and practices have been independently arrived at and have never been influenced or interpreted by The Cement Institute (Tr. 42234; 42293-95; 42304-05; 42316-18; 42320-22; 42362).

6. Exception is further taken to the failure to report the following evidence concerning Monarch's practices in submitting bids to state and federal agencies:

Monarch has always determined independently of any of its competitors whether or not it would bid at all, whether it would bid f.o.b. mill or f.o.b. destination, and the prices it would bid in response to invitations of state and federal authorities and has never had any agreement with any of its competiters with regard to anything pertaining to such matters (Tr. 42206-07; 42210-16½; 42258-59; 42260-62; 42267-69; 42281-86; 42337).

During the last ten years, Monarch's sales to state and federal governmental agencies have averaged only about 2% of its total sales. Monarch prefers to deal with its regular commercial customers rather than with the federal government (Tr. 42192-93; 42263-66). The Examiner rejected other evidence on this subject (Resp. Exs. 3433 A-Y for id.).

Monarch has found that the attitude with regard to the type of bid desired differs as between officials in charge of lettings of the federal government. In determining whether to submit a bid f.o.b. mill or f.o.b. destination, the company attempts to anticipate what type of bid the particular officer in charge desires and to try as nearly as it can to conform thereto (Tr. 42269-76). The Examiner rejected other evidence on this subject (Resp. Exs. 3434 A-Y for id.).

Since May, 1934, Monarch has submitted to the federal government where land grant rates have been involved bids containing a so-called "control clause". Monarch learned of this clause from a Code Authority price filing notification and adopted it without discussion or agreement with any competitor (Tr. 42336-37).

The office of the Quartermaster General at Fort Riley, Kansas, has since included such a clause in its invitations

to bid and Monarch has submitted bids as requested (Tr. 42270-71). Further evidence was rejected by the Examiner (Resp. Exs. 3435 A-P for id.; Tr. 42271-76).

7. Exception is further taken to the implication that all of the bids of the Monarch Company were identical with bids of competitors and to the failure to report that Monarch has submitted bids to the federal government that were not identical with those of other bidders (Com. Exs. 171 A-C; 176 A; Tr. 1540-43; 42359-62).

8. Exception is further taken to the statements and implications in the Report that Monarch refused or declined to sell f.o.b. mill to the government and to the failure to report the evidence to the contrary (Com. Exs. 376; 175 A; 170 A; 366 B; 180 A-C; Tr. 42269-71). Other evidence to the same effect was rejected by the Examiner (Resp. Exs. 3434 A, i for id.; Tr. 42271-76).

9. Exception is further taken to the failure to report that Monarch has always secured any land grant rate information it needed from railroads and that the sales manager and vice-president of Monarch testified that the company has never used any land grant rate information as the result of discussion or agreement with competitors (Tr. 42235-36).

10. Exception is taken to the failure to report the following evidence regarding the pricing policies of Monarch:

Monarch's vice-president and sales manager testified that Monarch has never had any agreement with respect to whether its mill at Humboldt should or should not be considered a base mill or as to whether or not any particular mill should be considered a base mill nor has it ever had any agreement or understanding with regard to the amount of the price base at any mill or with regard to prices to be quoted (Tr. 42192; 42290-93; 42304; 42307-09; 42323; 42337-38).

It is Monarch's general policy to sell its cement at delivered prices. Monarch has never received a request from any contractor or dealer for quotation of any price other than a delivered price. During the last ten years,

Monarch's sales to dealer and contractor customers have averaged about 95% of its total sales (Tr. 42190; 42193; 42276-81; 42345-46).

Monarch is primarily a price follower, *i. e.*, it determines what the lowest prices in its marketing area are and meets or beats them. It secures its information with regard to prices being quoted by its competitors in that area from its salesmen operating in the field, from its dealer customers and from tabulations of bids taken at public letvings. Monarch has no other sources of price information (Tr. 42190-92).

To the extent permitted by the Examiner evidence was offered to show that there have been instances where Monarch has not followed price increases initiated by competitors (Tr. 42249-53; Resp. Ex. 3431 for id.).

Monarch has at all times, except during the effective period of the NRA cement code, sold cement at prices less than those appearing on its current published quotations and on terms of sale better than its openly published terms and has made such sales to dealers as well as to contractors. Monarch sells its cement at cut prices in order to meet secret prices being quoted by its competitors. Monarch learns of competitors' sales below their published prices from friendly customers or satisfies itself from the circumstances surrounding particular transactions. It has been Monarch's experience that sales at cut prices have always been extensive and general throughout its marketing area. One of Monarch's contractor customers is the Abel Construction Co., which operates in Nebraska. The owner of this concern is a Monarch stockholder. In spite of this, Monarch has been unable to sell any cement to the Abel Company for Nebraska highway work since 1929 because the company has always secured cut prices from Monarch competitors which Monarch was unable to meet. The volume of this business which was purchased from competitors since 1929 at prices below their published prices has amounted to over a million barrels. The amount of cement that Monarch sells at cut prices has varied from year to year but, with the exception of the NRA years, Monarch's sales at cut prices have comprised a substantial

portion of its total sales and in some years practically all of Monarch's sales to contractors have been at cut prices (Tr. 42293-304; 42309; 42338-43; 42344-60; 42433-34).

11. Further exception is taken to the failure to report that Monarch has always assumed liability resulting from loss or damage to its cement in transit and that immediately upon receipt of a customer's substantiated claim for loss or damage, Monarch credits the customer's account with the amount of the loss and files a claim in its own name with the railroad involved (Tr. 42244-46).

12. Exception is taken to the failure to report the following evidence with regard to dealer policies of the Monarch Company:

Monarch has always made the bulk of its sales to its dealer customers and has always considered its dealers, because of the vital functions they perform in the distribution of Monarch cement, to be its most important class of customers (Tr. 42193-94).

Monarch has always independently passed upon the qualifications of those to whom it would sell as dealers and the vice-president and sales manager of the company testified that Monarch has never had any understanding or agreement with competitors as to whom it should recognize as a dealer or as to what the qualifications of a dealer should be (Tr. 42196; 42332).

In addition to its dealer customers, Monarch has always sold cement direct to various types of customers including the United States and state governments, railroads, block manufacturers, ready mixed plants, and contractors. Monarch has at times adopted and announced policies in this regard similar to policies of competitors that its salesmen have found in the field. However, Monarch has never strictly lived up to the terms of policies it has announced but rather has always varied the terms of its policy depending upon the circumstances of the particular case (Tr. 42196; 42325-32; 42332-33; 42414-15).

13. Exception is taken to any implication by reference to "meetings" that Monarch participated in any improper or unlawful meeting or that any understanding or agree-

ment was arrived at by Monarch at any meeting or at any place or time (Tr. 42318; see also exception 3 and citations, *supra*).

Further exception is taken to the reference to Com. Exs. 3235-Z82 which refers to a meeting of the Portland Cement Association in June 1911 because Monarch Cement Company had not been organized at that time (Tr. 42183; and see Paragraph 44 of Report).

14. Exception is taken to the failure to report any of the following evidence regarding the Monarch Company:

Monarch has at times delivered cement at its mill to customers' trucks in order to meet the competition of the services which some of its competitors were offering to the trade. Monarch never received requests for truck deliveries except from a few local customers and over the eight-year period during which the company complied freely with such requests, sales for truck delivery averaged less than 1 per cent of its total sales. Monarch discontinued making such deliveries after it found that a competitor had announced its intention of discontinuing the practice at its mill. Monarch has never had any understanding or agreement with competitors with regard to trucking (Tr. 42198-99).

Water transportation has never been available from Monarch's mill and the company has never had any demand for delivery by water nor has it ever employed any water transportation in the shipment of its cement. The vice-president and sales manager of the Monarch Company testified that Monarch has never had any agreement or understanding with any competitors with regard to water delivery or with regard to the method of delivery it would or would not use in distributing its product (Tr. 42194-95).

Monarch's cement has never come into competition with foreign cement and the company has never taken any interest in or steps with regard to it. Monarch has never had any agreement or understanding with competitors regarding foreign cement (Tr. 42195).

Paragraph 45

(*Monolith*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Monolith Portland Cement Co. is "identified", or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*):

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Monolith is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that executives of the Monolith company denied that the company had entered into any conspiracy with anyone with reference to the sale of cement (Tr. 48110).

4. Exception is taken to the failure to report the following evidence regarding Monolith's membership in The Cement Institute:

Monolith did not become a member of the Institute until after the Institute's Code of Ethics had been officially cancelled. (Com. Ex. 606 H; Resp. Ex. 2174 C; Tr. 16699; 16927-29).

The company has never participated in any of the Institute's statistical services (Com. Exs. 595 C; 3113; Tr. 2809; 16710-11) nor has it ever received or used the Institute's rate service: this service never extended to the territories in which Monolith does business (Com. Exs. 595 D-E; Tr. 3156; 16852-53).

There is no evidence that the Institute ever formulated or interpreted or attempted to formulate or interpret any of Monolith's policies or practices.

5. Exception is taken to the statement that Monolith's bid on the letting represented by Com. Ex. 120 B, cited in Paragraph 45, was identical with those of other bidders on the ground that it is contrary to the evidence. Exception is further taken to the failure to report that on the letting referred to in Com. Ex. 120 B, Monolith bid a price which was not identical with any of the prices bid by other bidders (Com. Ex. 120 B). The letting referred to took place on May 3, 1937 and not on May 31, 1937 as stated in Paragraph 45.

6. Exception is taken to the failure to report that the letting referred to in Com. Ex. 111 F, cited in Paragraph 45, took place during the period when open price filing provisions of the NRA Cement Code were in effect; that Monolith bid the destination cost for Odair, Wash., which was on file with the NRA Code Authority; and that this price was 36¢ lower than Monolith's commercial price list price for that destination (Com. Exs. 277 N; 2127).

7. Exception is taken to the statement in Paragraph 45 that Monolith was "involved in identical bidding" on April 9, 1937 on the ground that it is contrary to the evidence (Resp. Ex. 3785).

8. Exception is taken to the failure to report that Monolith has submitted many bids to governmental agencies which were not identical with any of those submitted by other bidders (Com. Exs. 128 A-H; 129; 134 C-E; 378-T; 1099 A; 1303 A-B; 1339; 1381; 3261 S; Resp. Exs. 233 C; 273 A-H; 384 A-B; 3691 A-C; 3692; 3784 A-B; Tr. 10025; 10234-36; 10170-71). Exception is further taken to the failure to report that Monolith has submitted many f.o.b. mill bids to governmental agencies (Com. Exs. 124 A; 128 A-H; 129; 134 C-E; 1303 A-B; 1339; 1381; 3261 i, K, R, S; Resp. Exs. 233 C; 273 A-H; 290 H; 296 N; 297 B-N; 302 J; 384 A-B; 3691 A-C; 3692; Tr. 322-23; 10025; 10234-36; 10270-71). Further evidence regarding f.o.b. mill and non-identical bids was rejected by the Trial Examiner (Resp. Exs. 3660 A, B, D, J, T, U, W, X, Z, Z1, Z2, Z11, Z12, Z14, Z16, Z17, Z21-Z25, Z27-Z34 for id.; Tr. 47700-04).

9. Exception is taken to the citation in Paragraph 46 of Com. Exs. 971-23A-23G and of Tr. 8642 and 8945 because they do not relate to any policies or practices of the Monolith company. Exception is further taken to the citation of Tr. 8634-37 and 8786 because they do not relate to communications of the Monolith company.

Paragraph 46

(Monolith Midwest)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Monolith Portland Midwest Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Monolith Midwest is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that executive officers of the Monolith Midwest company denied that the company had ever entered into any conspiracy of any kind with any competitor or anyone else with reference to the sale of cement (Tr. 48110).

4. Exception is taken to the failure to report that Monolith Midwest is a small company with one mill having a capacity of 1800 barrels per day (Resp. Ex. 2520).

5. Exception is taken to the failure to report the following evidence regarding Monolith Midwest's membership in the Institute:

The company did not become a member of the Institute until after the Institute's Code of Ethics had been officially

cancelled (Resp. Ex. 2174 C; Tr. 16699; 16925-29; Com. Ex. 808 H-L). The company has never participated in any of the statistical services of the Institute (Com. Exs. 595 C; 814; Tr. 2805; 16710-11) nor has it ever used the Institute's freight rate service (Tr. 16852-53; Com. Exs. 595 D-E).

There is no evidence that the Institute has ever formulated or interpreted or attempted to formulate or interpret any of the company's policies or practices.

6. Exception is taken to the misleading statement in Paragraph 46 that Monolith Midwest was "involved in identical bidding" because it erroneously implies that the company has submitted sealed bids to federal or state governmental authorities which were identical with bids of competitors. The invoices of the Monolith Midwest company referred to in Paragraph 46 are invoices on cement sold to dealers on the open market at commercial prices f.o.b. mill or destination in all instances. Further exception is taken to the unsupported statement that Monolith Midwest's prices as shown on its invoices are identical with "those bid" by Colorado Portland Cement Co. and by Portland Cement Company of Utah.

Exception is further taken to the failure to report that there is no evidence that Monolith Midwest has ever submitted a bid on federal or state government work that was identical with that of any other bidder; and that the evidence is that on the one occasion that the company bid f.o.b. destination in response to an invitation of a governmental agency, its price was not identical with that of any other bidder (Com. Ex. 125 B). Exception is further taken to the failure to report that the evidence shows that on all other invitations of governmental agencies in response to which Monolith Midwest bid, it bid prices f.o.b. mill only which were not identical with any prices quoted by any other bidders (Com. Exs. 127 A-B; 1328-31; 1339; 1341; Resp. Exs. 384 A-B; 3692; Tr. 10010-15; 10025; 10263-64; 10266-67; 10269-70; 10271-72).

7. Exception is taken to the failure to refer to Tr. 9343-44 and Tr. 9346 in connection with Com. Exs. 1202 G, H cited in Paragraph 46.

3. Exception is taken to the failure to report that Monolith Midwest delivers cement by trucks at its mill (Com. Ex. 2722(3)).

4. Exception is further taken to the failure to report that there is no evidence with regard to pricing and dealer policies or any other policies of the Monolith Midwest company except those referred to *supra* and that executives of the company denied that they had ever had any agreements relating to the sale of cement (Tr. 48110).

Paragraph 47

National)."

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that National Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that National is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the vice-president in charge of sales of National Cement Company appeared as a witness on its behalf and testified fully regarding the practices and policies of the company as well as their history and development. This testimony was directed to the charges in the complaint as well as to evidence offered by Commission's counsel affecting National, and included all subjects referred to in Paragraph 47 of the Report (Tr. 39477-807; see more specifically below).

4. Exception is taken to the failure to report the following evidence regarding the location and organization of National:

The principal raw materials necessary for producing cement are obtained from a quarry at the plant site, Ragland, Alabama (Tr. 39561). The National plant is 45 miles east of Birmingham where there are four competing cement plants. National is also surrounded on the north, east and south by mills of competitors and the area in which it has a freight advantage over competitors is extremely limited and sparsely settled. In fact, the population of that area is about 72,300, as compared with the following population for Alabama and adjoining states: Alabama — 2,646,248; Georgia — 2,908,506; Mississippi — 2,009,821 (Resp. Ex. 3012).

In order to obtain sufficient business to keep the plant operating, National seeks to sell in an area considerably larger than that in which it has a freight advantage. Through the years, however, lower prices quoted by existing mills and new mills entering the field have caused the company to withdraw from several areas (Tr. 39488-89; 39492; Com. Exs. 976-9Z). Such markets once abandoned are impossible to reenter (Tr. 39492-93).

5. Exception is taken to the failure to report the following evidence regarding National's membership in The Cement Institute:

The practices and policies of National have not been limited, influenced or affected in any way by the company's membership in the Institute (Tr. 39584; 39588).

National has used compilations of freight rates in the operation of its business since the company was formed. Originally it used freight rate books prepared by its own traffic manager. By using the Institute rate books it has been able to abolish a full-time traffic clerk and save time and money (Tr. 39588-90). The testimony shows that National has never had any understanding or agreement with competitors regarding the use or non-use of the Institute rate books but has used them in the same way that it previously used its own books (Tr. 39591).

The availability of the statistical service of The Cement Institute has not in any way caused National to curtail production nor has the company ever had any arrangement or agreement with competitors for the sharing or division of business or sales territory (Tr. 39591-92; 39489).

6. Exception is further taken to the failure to report the following evidence regarding the pricing practices of National:

Its pricing policies have been determined by the vice-president in charge of sales who testified on its behalf (Tr. 39625). National has been a price follower, meeting the lowest prices it has found in the various markets at which it sells cement. By choice, therefore, it has had the status of a non-base mill (Tr. 39628; 39629-30). The company's experience has been that there is no one respondent in its marketing area which consistently assumes price leadership (Tr. 39632).

National makes most of its sales at delivered prices and has done so since the company was formed in 1922, but, having found that its competitors were doing so, has quoted railroads and the federal government either f.o.b. destination or f.o.b. mill, depending upon the nature of the request (Tr. 39627-28; 39652).

Except during the period when open price filing was carried on, under NRA and shortly thereafter, National has never known in advance what the prices of competitors might be (Tr. 39594; 39624; 39629). The company learns of existing prices solely through reports from its salesmen and customers and from the published announcements of the results of bidding (Tr. 39628-29; and see citations next above). The witness for the company testified at length regarding specific price changes which occurred in National's marketing area, and the independent manner in which the company learned of such changes, their nature and extent and its own action regarding them (Tr. 39594-95; 39601-02; 39607-08; 39619-25; Resp. Ex. 3042). Contemporary documentary records of the company were produced to supplement and confirm the oral testimony but they were rejected by the Trial Examiner (Resp. Exs.

3043; 3044 all for id.; Tr. 39619-14). Although the company issues printed quotations to the trade on the occasions of changes in its prices (Tr. 39633-34), it has never had any understanding or agreement that it would do so or that it would adhere to such quoted prices (Tr. 39634). There have been times when National has deviated from its printed quotations both as to price and terms and conditions, and the company has obtained information from the field that its competitors have also given concessions in price (Tr. 39634-35; 39636; 39638-42).

The evidence shows that National has never had any understanding or agreement that it would or would not recognize certain points as basing points, or that it would or would not use basing points in connection with the determination of its prices (Tr. 39631-32; 39706).

At one time National used the so-called "control clause" in quoting the government. It adopted this clause when it found such clause filed with the Code Authority as part of the terms and conditions of a competitor's price. The clause was not adopted or used as the result of any understanding or agreement with competitors (Tr. 39651-52). In recent years National has bid with and without the "control clause", depending on the trend of competition at particular times (Tr. 39654-56).

7. Exception is taken to the failure to report the following evidence regarding Com. Ex. 180 (cited in Paragraph 47):

The vice-president in charge of sales of National testified as to the independent manner in which the company determined its bid on this letting and produced contemporaneous documentary company records supplementing the testimony (Tr. 39664-65; 39666-68; Resp. Exs. 3046 A-o). Additional documentary evidence relating thereto was rejected by the Trial Examiner (Resp. Ex. 3047 for id.).

The invitation to bid provided that the award would be made on the basis of the "lowest destination cost to the Government of the cement delivered f.o.b. Monroe, Louisiana" (Resp. Ex. 3046 H). Bidders shipping from points on which no land grant rate was applicable were invited to "equalize freight rates with land grant rates

available to the Government destination" (Resp. Ex. 3046 H). National responded to the invitation to bid f.o.b. Monroe by bidding its commercial price at that point (Tr. 39667; Resp. Ex. 3047 for id.).

National bid a destination cost in response to the alternative bid invited. This enabled the government to buy from National f.o.b. its mill at Ragland and ship on government bill of lading. National obtained land grant rates from the L. & N., Southern, and Illinois Central Railroads (Tr. 39666-67; Resp. Ex. 3046 A) and used the rate obtained from the L. & N. because it gave the lowest cost to the government at Monroe (Tr. 39667; Resp. Exs. 3046 A-B).

Fractions of a cent in a destination cost bid by a competitor of National had been dropped on a previous letting and that competitor obtained the award. The bidders on this letting, anticipating a recurrence, did likewise (Resp. Ex. 896; Tr. 25333; Resp. Ex. 3046 B).

8. Exception is taken to the failure to report that the vice-president under whose direct supervision the company's sealed bids were prepared, testified that its prices and terms on such bids were arrived at independently by National without agreement or understanding with competitors; and that full explanation was made of the manner in which such prices and terms were determined (Tr. 39663-96; Resp. Exs. 3046; 3048; 3050; 3051; 3053-54; 3056-57).

Further documentary evidence supplementing this proof was rejected by the Trial Examiner (Resp. Exs. 3047; 3049; 3052; 3055 all for id.).

9. Exception is taken to the failure to report regarding Com. Ex. 1088 (cited in Paragraph 47) that National's prices were the current commercial prices at the destinations involved (Resp. Exs. 968-73; 962-67).

10. Exception is taken to the failure to report the following evidence regarding truck delivery of cement by National:

National at one time, made deliveries at its mill to trucks of the two dealers in business in St. Clair County where National's mill is located. This was merely a cour-

tesy and was not developed to meet any competitive conditions (Tr. 39580-81) and the courtesy was not extended to dealers outside the county (Tr. 39581). National then found one of the local dealers who obtained truck delivery was selling the cement in the town of the other dealer and there was an immediate reaction from the latter, who refused to deal with National if this continued. Finally in the latter part of 1935 to avoid friction National ceased to extend the courtesy of truck delivery (Tr. 39582). There were no discussions and no agreement or understanding with competitors on the matter (Tr. 39706).

Apart from any friction with customers, National has had a natural disinclination to deliver to trucks: its plant is designed for carloading and has no adequate facilities for loading trucks; moreover, it has never had any demand to warrant incurring the expenditures necessary to establish special truckloading facilities. Selling to trucks is in effect retail selling for National, involving the same clerical costs as the normal carloading and at the same time proving more costly in other respects. National, however, never charged extra for loading trucks (Tr. 39537; 39581-82).

11. Exception is taken to the failure to report that National is far removed from any navigable stream and has never had occasion to use water for transporting cement (Tr. 39537).

12. Exception is taken for the failure to report the following evidence regarding National's policies as to the diversion of cement in transit:

National has long had a policy whereby it sells cement to dealers only in the town or area where his place of business is located. This policy is based on self-preservation, because to sell him elsewhere would antagonize the National dealer having a place of business at the point where the sale was made (See Exception No. 10, *supra*). The policy is not the result of agreement either with dealers or with competitors (Tr. 39571-72).

To permit diversion of cement in transit by a dealer from one town to another would frustrate this policy. Accordingly National has attempted to prevent it. As early as 1930 National's traffic manager devised a bill of lading

stamp to prevent such diversion and the company has used this stamp ever since. This stamp was not adopted in conjunction with or by agreement or understanding with any competitors. In fact National used such a stamp five years before any other respondent. The stamp used by National is not the same in language as that used by other respondents, and National still uses its own independently prepared stamp (Tr. 39573-80; 39783; Resp. Exs. 3040-41). National has had no understanding or agreement with competitors to discourage diversion of cement (Tr. 39579-80).

13. Exception is further taken to the failure to report the following evidence regarding the dealer policies of National and its policy with respect to direct selling:

In 1930 National independently adopted the 5 cent trade discount plan for dealers, which had been inaugurated by the Lehigh Company. It discontinued this discount plan shortly thereafter when its customers expressed strong disapproval. There was no advance notice to National regarding the use of the plan by any competitor and National had no agreement or understanding regarding its adoption or discontinuance (Tr. 39511-27; Resp. Exs. 3021; 3022; 3032; 3035). Part of the evidence offered to show this was rejected by the Examiner (Resp. Exs. 3023-31; 3033-34 all for id.).

Dealers have always been the most important outlet for National cement and represent the year-in and year-out business upon which the company must depend (Tr. 39533). Each dealer gives service in his own locality, which tends to promote the sale of cement. It involves supplying contractors with materials necessary for construction work and provides the normal retail outlet for cement (Tr. 39533).

National has always made sales direct to users, such as state and federal agencies, railroads, products manufacturers and contractors on particular kinds of work. Although this business represents a large proportion of National's total shipments it is not sufficient to make it possible for National to sell all cement direct and forego dealer customers (Tr. 39533-34).

With respect to the methods of marketing cement outlined in Com. Exs. 547-AD-4i, National has never adopted them nor had any agreement or understanding with respect to them. On the other hand, the methods there outlined represent in large measure the policies which National followed in most cases for as many as five years prior to July 1935. The company, however, in practice and in meeting competitive conditions has deviated from its general policies with respect to the various types of work which it would sell direct or would sell through dealers (Tr. 39534-37).

National has selected its dealer customers independently in accordance with their qualifications to sell National cement (Tr. 39548; 39551). The company has never had any understanding or agreement with its competitors regarding the selection of its dealers or with dealer organizations or associations (Tr. 39551-52).

Prior to the appearance of Article XI in the NRA Cement Code, National had no restricted sales policy, but Article XI made no substantial change in the general policies which National had been following prior to that time (Tr. 39553). National's policies with respect to the kinds of business which it sold direct have always been flexible, responding to changes in competitive conditions as they occur (Tr. 39553-54; 39557-59; Resp. Exs. 3037; 3038; 3039).

14. Exception is further taken to the failure to report the following evidence regarding the competition of imported cement in so far as it affects National:

Imported cement has been sold regularly in the markets where National sells and in that area imported cement prices are lower than the domestic prices. National has followed domestic prices downward in those markets. The company has never refused to sell a dealer because he was selling foreign cement (Tr. 39593-94).

15. Exception is taken to the failure to report in connection with Paragraph 93 that the company referred to as "National" in Tr. 395-424 (Witness, Colgrove) and Tr. 7973 (Witness, Dain) refers to National Portland Cement Company, a non-respondent, and not to National Cement Company. Exception is further taken to the failure to

report in Paragraph 93 that National Cement Company has never sold cement in either Pennsylvania or New York. Com. Ex. 3116 cited in Paragraph 47, in no way bears upon or affects the practices and policies of National Cement Company.

Paragraph 48

(*Nazareth*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Nazareth Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Nazareth is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the executive vice-president of Nazareth Cement Company who is also its general manager and general sales manager in complete charge of every phase of the company's activities, appeared as a witness on its behalf and testified fully regarding the practices and policies of the company as well as their history and development. This testimony was directed to the charges in the complaint as well as to evidence offered by Commission's counsel affecting Nazareth and included all subjects referred to in Paragraph 48 of the Report (Tr. 3881-85; 4018-33; 19054-67; 27953-8469).

4. Exception is taken to the failure to report the following evidence concerning the history and organization of the company:

Nazareth is not affiliated with any other cement company (Tr. 27957). It maintains district sales offices in New York

and in Philadelphia, and has no warehouses, silos or distributing points other than its mill. (Tr. 4029; 27957; 27966).

Nazareth's mill is close to its quarry and in close proximity to its best markets. In 1926 an expert survey of the quarry indicated an available supply of rock at the then current rate of operation sufficient for 100 years. On the basis of this assurance, the company made improvements in its mill between 1926 and 1931 at a total cost of $3,300,000 (Tr. 27957-58; 27966; 27968).

The Nazareth mill has an annual capacity of about 2,000,000 barrels. The mill produced this amount in 1927 or 1928 but has been unable to operate at capacity in recent years. The present volume of the company's sales is about one-half of what they were in 1927 or 1928 (Tr. 27970-73; 27997-98; Resp. Ex. 1618).

The rate at which the company operates its mill depends entirely upon current and prospective demand for cement. Its shipments vary considerably according to the season of the year, and the company has found that in order to take care of peak demand in heavy shipping months it must provide storage facilities and build up anticipatory stocks of cement beyond those it would need in the absence of seasonal variation in calls for shipment. The result has been increased costs of operation (Tr. 27944; 27996-97; 28000; Resp. Ex. 1422).

The company normally ships its cement into the Northeastern states. It ships north as far as southern Maine (shipments to states north of Massachusetts being few), south to Washington, D. C. and west as far as Altoona, Pa. The farthest distance it ships from its mill is about 300 miles. The company's most important markets are New York City and Philadelphia, which are respectively 90 miles and 70 miles from the mill. Seventy per cent of its shipments are made into an area of less than 100 miles from the mill and ninety-seven per cent are made to points within 200 miles (Tr. 4018-19; 27966-68; 27974; 27977; 27980-86; 27991-93). The Examiner rejected further evidence regarding the geographic distribution of Nazareth's shipments (Resp. Ex. 1421 for id.; Tr. 27986-90; 27993-94).

The present area in which Nazareth markets its cement is considerably smaller than the area in which it originally solicited business. This shrinkage was due to the construction of new mills in parts of the company's marketing area and its inability to meet their competition (Tr. 27979-80).

Nazareth determines the extent of the area in which it solicits business by the amount of business available, its facilities for service to customers as compared with those of competitors, and the amount of net return at its mill (Tr. 27973-77).

The evidence is that the Nazareth company has never had any understanding or agreement with anyone with regard to allocation of business or territory (Tr. 19063-64; 28352-56; 28357; Resp. Ex. 1618).

5. Exception is taken to the failure to report that George F. Coffin, formerly General Manager of Nazareth and at one time president of The Cement Institute, died before the commencement of the hearings in this case (Tr. 25971; 47973-74; Resp. Exs. 3753 A-B).

6. Exception is taken to the failure to report the following evidence concerning Nazareth's membership in the Institute:

None of Nazareth's policies or practices have ever been influenced by The Cement Institute nor has the Institute ever attempted to influence any of them (Tr. 28005; 28348-51; 28357; Resp. Ex. 1617).

Accurate freight rate information has always been essential to Nazareth in the operation of its business. Since the inauguration of the Institute rate service, the company has secured the rate information it requires both in connection with the pricing and the shipping of its products from Institute rate books. Prior to the Institute service, Nazareth always subscribed to similar independent rate services when such services were available. As a result of its use of these various services the company has been able to dispense with a traffic department and the expense incident thereto. The existence of the Institute rate service is not necessary in order for the company to quote prices and to meet competition (Tr.

4019-23; 4025-26; 4027-28; 28026-29; 28031-40). The Examiner rejected further evidence regarding the cost of the service (Tr. 28040-43).

The evidence is that Nazareth has never had any agreement or understanding with anyone with regard to use of the Institute service or any other rate service (Tr. 28357).

7. Exception is taken to the failure to report that Nazareth's bids of July 17, 1936, June 16, 1936 and August 30, 1937 referred to in Paragraph 48, were all in response to invitations of federal and state governmental agencies for bids f.o.b. destination only, and that the prices Nazareth bid were its current commercial prices at the destinations involved (Com. Exs. 9 C; 303 D; 372 A cited in Par. 48; Com. Ex. 372 B; Resp. Exs. 783; 785-A-E; 795 C; 796 A-Z63; 3182 A-G; Tr. 28043-45).

8. Exception is taken to the failure to report the following evidence regarding bidding policies and practices of the Nazareth company:

There are no land grant rates available to the federal government in any part of the area in which Nazareth does business. The company has never used the so-called "control clause" (Tr. 3883; 21071; 28047).

It has never submitted bids in response to invitations of governmental agencies, state or federal, calling for delivery outside of its normal marketing area. All of the bids that Nazareth has submitted to governmental agencies, state or federal, have been in response to invitations calling for prices f.o.b. destination only; and in bidding on these invitations the company has always quoted its current commercial price at the destination or destinations involved (Com. Exs. 14; 15 B, J; 381 U; 382 T; 383 U; 384 U; 387 D-J; 1099 D, M, R, W; Tr. 27967; 28043-45; Resp. Exs. 763-68; 783; 785-93; see also Exception No. 7, *supra*).

Since March 1938, Nazareth has received an occasional invitation from the federal government for bids f.o.b. mill. The company has not bid in response to any of these invitations because it has never had any market for cement at its mill and had never prior thereto received a request

from any customer for any price other than a price f.o.b. the market at destination (Com. Ex. 1339; Resp. Ex. 40; Tr. 28048-49; 28052-54).

Nazareth has never withdrawn or requested permission to withdraw any bid it has submitted to a governmental agency, state or federal (Tr. 28047).

Since 1924 Nazareth's sales to state and federal governmental agencies have averaged only 2.2 per cent of its total sales. The business of such agencies has never been an important factor in Nazareth's total business (Tr. 28054-56; 28321-22; 28343-44). Further evidence was rejected by the Examiner (Resp. Ex. 1616 for id.).

The evidence is that Nazareth has never had any agreement or understanding with anyone regarding any of its bids or bidding practices (Tr. 28357).

9. Exception is taken to the statement, "See also: as to dealer policies, Resp. Exs. 1488, 1489; Tr. 4023; 4031", because this statement and the citations accompanying it are a misleading and inadequate reference to Nazareth's dealer policies. The references to the transcript have no bearing on Nazareth's dealer policies and no reference whatever is made to the more than one hundred pages of testimony and numerous exhibits in which the development of the company's dealer policies and practices was described in detail by the vice president in charge of these policies of the company (Tr. 28203-351; Resp. Exs. 1439-44; 1447-48; 1473-554; 1608-617). The evidence concerning these policies is as follows:

It has always been the company's policy to sell its cement to dealers and to certain other classes of customers including state and federal governments. It published an announcement of its policy in this regard on February 21, 1931. This announcement, sent to all of its dealer customers, was published to meet new terms and conditions of sale that had previously been announced by competitors and picked up in the field by representatives of the Nazareth company (Tr. 28208-27; 28229-48; Resp. Exs. 630; 657; 1473-87).

Nazareth continued to sell its cement in accordance with its announced policy of February 21, 1931, plus some changes until Article XI of the NRA Cement Code became

effective. This Article did not bring about any great change in Nazareth's policies and practices but merely set down in writing an accumulation of policies and practices that the company had been following prior thereto. During the period that the Article was in effect, Nazareth sold in accordance therewith. After it had been suspended as the result of dealer protest, Nazareth varied its practice in response to divergent desires on the part of its customers and the necessity of meeting numerous different competitive situations. During this period the company was without a definite policy of any kind, with the result that its relations with its dealer customers were in a state of such constant turmoil that it lost considerable business (Resp. Exs. 1492-554; 1608-09; Tr. 28248-49; 28269-73; 28275; 28283-92).

Nazareth continued to operate in this fashion until February of 1935, when, in response to individual requests of many of its dealer customers, it adopted a sales policy which had been announced and put into effect by one of its competitors on February 20, 1935 and had met with favorable response from the dealers. News of this competitive announcement of policy was telephoned in to Nazareth's office from the field by its salesmen on the morning of February 21, 1935, and Nazareth immediately issued written instructions to all of its district sales managers concerning its reaction to this competition, its decision to meet it and the reasons therefor in detail. Nazareth issued an announcement of policy to the dealer trade on February 21st (Resp. Exs. 1489-90; Tr. 28248-61; 28266-69; 26273-75). Further evidence, documentary and otherwise, relating to these instructions and the circumstances under which Nazareth took this action was rejected by the Examiner (Resp. Exs. 1491 A-B for id.; Tr. 28261-66).

After the company's February policy was issued to the trade, some of its dealer customers began to find fault with the policy and to ask that changes be made. In April of 1935 Nazareth learned from its customers that one of its competitors had issued a new policy announcement. Nazareth decided to adopt the new policy as announced and, on April 8, 1935, issued an announcement of its own. The new policy seemed to satisfy its customers and the

company has continued to operate in accordance with it to date (Resp. Exs. 1488; 1610-15; Tr. 28249; 28293-95; 28310-21; 28347-48). The Examiner struck evidence regarding the attitude of Nazareth's dealer customers toward its policy (Tr. 28314-15).

The evidence is that Nazareth has had no understandings or agreements with anyone as to any of its dealer policies (Tr. 28235; 28245; 28247; 28320; 28357; see also *supra*).

Nazareth's dealer customers have been its most important sales outlet. Since 1924, an average of 78.9% of its total sales have been made to dealers (Tr. 28321-22; 28343). Further evidence was rejected (Resp. Ex. 1616 for id.; Tr. 28338-39).

10. Exception is taken to the wholly inadequate reference to the evidence regarding pricing policies and practices of the Nazareth company and to the failure to report the following evidence:

Nazareth has found that the competition it must meet is at destination; and that there is no market at its mill. Nazareth has never received a request from any commercial customer for an f.o.b. mill quotation (Tr. 28001; 28048).

Nazareth is a price follower. At any destination where it does or expects to do business, it quotes the lowest price being quoted there by any competitor (Tr. 28004-06).

Nazareth's salesmen operate under instructions to report all competitive prices and price changes they find in the course of their activity in the field. In addition to information from this source, Nazareth's dealer and contractor customers call to its attention immediately any new prices quoted by competitors. Nazareth also secures information with regard to competitors' prices from tabulations of public bids. The company has no other sources of information with regard to competitors' prices (Tr. 28006-12; Resp. Exs. 1423 A-1431 B).

When Nazareth receives information of price changes by a competitor at some destinations in its marketing area, it immediately calls its salesmen and dealers at a number of other destinations in order to ascertain the extent of the change. If new prices quoted represent reductions,

the company meets them immediately and advises its salesmen so to inform its customers. If the new prices represent increases, the company itself decides whether to follow and acts accordingly (Tr. 28006-08).

At times of price changes, Nazareth analyzes all new prices picked up in the field in order to determine whether by deduction of freight they work back to a constant at some common figuring or base point or points. If this is the case, the company assumes that the competitor initiating the change has used the particular figuring point or points in quoting prices. In making such an analysis, the company's primary interest is the price at destination which is the price it must and does meet in order to secure business regardless of whether a base figure is reflected (Tr. 28012-14).

Nazareth has never had any foreknowledge as to which are bases or as to the amount of any base mill. Nazareth's only source of information as to whether a particular mill is a base mill and as to the amount of the base figure is the price information it receives from the field. The company compiles and keeps current lists of the bases and base figures it learns of in this manner so that it is available in the office. It does not supply copies of these lists to its salesmen nor has it ever exchanged any such lists with competitors (Tr. 4023; 28014-15; 28018; 28357).

When it changes its prices, Nazareth broadcasts new quotations to its trade in all of the area in which it solicits business. The printed form on which the new quotations appear shows Nazareth's price at the addressee's destination. The forms are made up in quadruplicate, the original being sent to the customer or prospective customer, one copy to the district office having jurisdiction over the particular destination and the remaining two being kept in the Nazareth, Pa., office. Copies retained by the company are bound up in loose leaf books and are used by it in quoting prices from day to day. The Nazareth company makes up no other price lists or books (Resp. Exs. 1439 A-B; Tr. 28019-21).

It has always been the company's policy to assume the risk of any loss or damage to its cement in transit to the

customer. If such loss or damage occurs, Nazareth secures from the affected customer the papers necessary to substantiate a claim, reimburses the customer in the amount of the claim immediately upon receipt thereof and then proceeds to prosecute the claim against the railroad (Tr. 28080-81).

Neither The Cement Institute nor any competitor has ever attempted to influence Nazareth's pricing policies in any way. The evidence is that Nazareth has never had any understanding or agreement with anyone with regard to any of its pricing policies (Tr. 28005; 28357).

11. Exception is taken to the statement, "As to meetings, Com. Exs. 2370 A, B; 3235-Z108; Tr. 19063-64"; on the ground that it implies that agreements or understandings were entered into at such meetings and that Nazareth was a party thereto. This is not supported by the evidence.

Exception is further taken to the citation of Com. Exs. 2370 A, B because it is apparent from the exhibit itself that the sole subject of the meeting referred to therein was "Incor" cement which was stated by the Examiner to be "thoroughly and completely and absolutely irrelevant" and "not involved in this case" (Tr. 36728; 42230). There is no evidence that any other subject was discussed or considered at this meeting.

Exception is further taken to the citation of Com. Exs. 3235-Z108 because it is the minutes of a meeting of the A.A.P.C.M. held in 1911 and because the evidence is that respondent Nazareth Cement Company was not in existence at that time and did not come into existence until 1918 (Com. Ex. 3127 A; see also first paragraph of Paragraph 48 of the Report).

Exception is taken to the failure to report that Tr. 19063-64 cited refers to a meeting of the cement industry in Chicago in March 1934 to vote on a plan for sharing available business drafted pursuant to Article VI of the NRA Cement Code, and that on motion of G. F. Coffin, the then managing head of the Nazareth company, the proposed plan was rejected in toto (Com. Ex. 557; 597 A-D; Tr. 25970). The pages cited further show that the meeting of March 1934 was the only meeting with reference to

this subject ever attended by the witness H. B. Robeson; that the Nazareth company was never party to any arrangement with regard to allocation of production or shipments.

12. Exception is taken to the failure to report any of the evidence regarding trucking policies of the Nazareth Company. This evidence is as follows:

Nazareth has made no deliveries to customers' trucks at its mill since the summer of 1932. Prior thereto deliveries to trucks were made whenever requested. The demand for trucking was always slight; the deliveries made to trucks at Nazareth's mill never exceeded 3 per cent of its total deliveries in any one year (Tr. 28093-94; 28100).

Nazareth's mill was not equipped for loading trucks and truck loading at the mill was dangerous to the customers, inconvenient for the company and more expensive than carloading. Despite this, until 1929, Nazareth charged customers taking delivery at the mill on their own trucks an f.o.b. mill price equivalent to its maximum mill net. In 1929, demand for deliveries to trucks increased with resultant aggravation of the then existing problems. In addition, with the increased trucking, Nazareth received an increasing number of complaints about trucking from good dealer customers. In order to compensate itself for the added expense of truck loading and also to discourage it, the company, in September of 1929, added a loading charge of 15¢ on sales for delivery to trucks. It continued this policy until 1932 when it discontinued trucking entirely after it had found announcements of competitors in the field indicating that they had taken like action (Resp. Ex. 704; Tr. 28094-99; 28133-38).

The evidence shows that none of Nazareth's policies or practices with regard to trucking have been the result of understanding or agreement with anyone (Tr. 28136; 28138; 28357).

13. Exception is taken to the failure to report any of the evidence concerning Nazareth's policies and practices with regard to foreign cement competition. This evidence is as follows:

In the late 1920's, imported cement began seriously to affect Nazareth's sales because dealers who handled it were taking business away from loyal Nazareth customers. Imported cement was being sold in various seaboard markets, particularly New York and Boston, at prices which Nazareth was unable to meet. The company did not feel that it could abandon those markets because they had always been among its principal sales outlets, and experience had shown it that it would be exceedingly costly to attempt to reenter any market, once abandoned (Tr. 28138-39; 28140; 28142-45).

In 1933, the company learned from information picked up by its salesmen and from its customers in the field that a number of its competitors were refusing to sell their brands to dealers handling foreign cement. The reaction of Nazareth's customers to this policy was favorable and consequently Nazareth decided to and did adopt a similar policy. Nazareth arrived at this decision independently and without understanding or agreement with anyone (Tr. 28145-59; Resp. Exs. 1443-44). In applying the policy, the company secured its information as to what dealers were handling foreign cement from its salesmen and from no other source. Its salesmen were specifically instructed to be on the lookout for information of this sort in the field and to report to the company offices (Tr. 28160-70). Further evidence, documentary and otherwise, relative to these instructions and the manner in which they were carried out was rejected by the Examiner (Resp. Exs. 1445-53 id; Tr. 28168-70). Toward the latter part of 1936, Nazareth discovered that many of its dealer customers who had been enthusiastic about its policy previously were themselves handling foreign cement and several of Nazareth's competitors who previously had such a policy abandoned it. Nazareth then decided to and did abandon this policy (Tr. 28159).

In 1935, Nazareth established stocks of cement in Brooklyn in order to meet the competition of similar stocks established by some of its competitors. Resulting prices were extremely low and when Nazareth found subsequently that competitors had withdrawn their stocks it withdrew its own (Resp. Exs. 1454-56; 1157-72; Tr. 28177-200).

Nazareth has met low so-called arbitrary or special prices quoted by competitors at points along the Atlantic seaboard after its sales force had found and reported such prices from the field (Tr. 28172-77).

The company has always met prices and conditions of sale as it found them in the field and the evidence is that it has never had any understanding or agreements with anyone concerning them (Tr. 28170; 28202-03; 28357).

14. Exception is taken to the failure to report that the evidence is that Nazareth has never had any understanding or agreement with anyone regarding its terms of sale and discount, or contract or other forms it uses in its business (Resp. Exs. 630; 1439-42; 1473-87; Tr. 28081-89; 28203-23; 28234-45; 28357).

15. Exception is taken to the failure to report any of the following evidence concerning Nazareth's policies with regard to diversions:

Nazareth has always had a policy of attempting to prevent a Nazareth dealer in one town from injuring the business of a Nazareth dealer in another town. This policy is essential to the maintenance of harmonious relations between the company and its dealer customers. As part of this policy, it has always been the company's policy to refuse to allow diversions of its cement either in transit or from the specific job on which cement has been ordered out. Since at least 1926, its contract forms have contained a clause prohibiting diversions of cement either in transit or from the specific job on which cement has been ordered out. Since 1935, it has also been stamping its bills of lading with a notation prohibiting diversions in transit except with its consent. The company first began to use this notation after it had been advised by its local railroad, the D. L. & W., that diversions in transit might be prevented thereby (Resp. Exs. 1440-42; Tr. 28002-03; 28056-57; 28067-73; 28091-89; 28091-93).

The evidence is that Nazareth has never had any understanding or agreement with anyone regarding its diversion policy or any of the means it has adopted to implement it (Tr. 28081-89; 28092-93; 28208; 28357).

Paragraph 49

(*Nebraska*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9 that Nebraska is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the unsupported assertion in Paragraph 82 and in footnote to page 9 that Nebraska is "identified" or connected with "group activities" or industry policies and practices. The only evidence remotely suggesting any connection of Nebraska with "group activity" is the correspondence of Mr. Boettcher in 1931 (Com. Exs. 2242-47 cited in Paragraph 49) and the evidence shows that no action ever was taken on the proposals referred to and no agreement, understanding or collusion resulted therefrom (Com. Exs. 1125 D-F; 3176 X; 976-4J; see also Exception No. 5 to Paragraph 178, *infra*).

3. Exception is taken to the failure to report the following in Paragraph 49: The sales manager of Nebraska who was in sole charge of its practices and policies (Tr. 41967-68; 42006-07; 42128-29; 42117-18) appeared as a witness on its behalf and testified fully regarding the history of the company, its practices and policies, and their origin and development. This testimony was directed to the charges in the complaint as well as evidence offered by Commission's counsel affecting Nebraska. It not only included all subjects referred to in Paragraph 49 of the Report but directly related to and explained passages from testimony and exhibits cited in Paragraph 49 (Tr. 41958-2179; see more specifically below).

4. Exception is taken to the failure to report or refer to the testimony of the sales manager of Nebraska relating

to Com. Exs. 2442 and 366 B (Tr. 42086; 42084-85; 42053-55); Com. Ex. 2237 (Tr. 42016-20); and Resp. Exs. 3421-22 (Tr. 42071-75; 42076-77; 42078-81).

Tr. 4961 and Resp. Ex. 274, cited in Paragraph 49 have no bearing on Nebraska or the subject matter for which they are cited. Tr. 13836-37 has nothing to do with Nebraska, except that Tr. 13856 shows that L. J. Hoenig is sales manager of Nebraska and Tr. 13889 shows that the sales policies and practices of Nebraska are handled by Nebraska's own sales department.

5. Exception is taken to the failure to report the following evidence regarding Nebraska's connection with Ideal:

The sales office of the Nebraska company is at Omaha and is conducted independently of the sales offices of Colorado, Arkansas, Oklahoma, Three Forks and Union (Tr. 13889; 42117-18; 42128-29). The testimony of Nebraska's sales manager shows that there is no arrangement whereby the prices, policies or commercial practices of the company are coordinated with the policies or practices of other companies associated with Ideal and that there were differences in the practices and policies (Tr. 41967-68).

6. Exception is taken to the failure to report the following evidence regarding the location of Nebraska's plant:

All raw materials for cement (except gypsum) are obtained at the plant site. Nebraska has no water transportation available but is served by four railroads (Tr. 41960-61). The area in which Nebraska has a freight advantage over competitors is a small one and extremely sparsely settled. The mill must shrink its net in order to sell cement in the few cities of any size in its marketing area—including even Omaha—and because of low prices, which it cannot afford to meet, doesn't try to sell in Kansas City, Des Moines, Sioux Falls and other of the larger settlements; Nebraska refrains from solicitation near mills of competitors for the same reasons (Resp. Exs. 3408; 3409; Tr. 41968-69; 41978-80; 41981-82).

Nebraska has partially abandoned some of the territory in which it formerly normally solicited business because of the establishment of new mills, increased competition and lower prices (Com. Exs. 976-4M; Tr. 41979-80; 42012-13).

7. Exception is further taken to the failure to report the following evidence regarding Nebraska's membership in The Cement Institute:

Nebraska became a member of The Cement Institute in May 1930 but resigned in September 1930. The company joined the Institute in June 1933 in order to participate in the drafting of an NRA Code for the Cement Industry (Tr. 41961-62; Resp. Exs. 2173 B-C). The evidence shows that the Institute has not formulated or influenced the sales policies and practices of Nebraska (Tr. 41962), nor has the Institute been a vehicle for discussion of marketing policies or prices (Tr. 42004-05).

The Compendium was never used by Nebraska in the operation of its business and no attempt was made to conform the company's practices to the matters covered therein (Tr. 42100). The sales manager of the company testified that Nebraska's policies and practices have been fashioned solely to meet competitive conditions (Tr. 41962).

He testified further that he did not know of any plan for sharing or allocating business, that the plant has never been operated under such an arrangement and the Company has never been a party to any agreement to limit or regulate production or shipments (Tr. 41961).

Nebraska does not subscribe to or use the Institute freight rate books and never has (Tr. 42048-50; Resp. Exs. 3420 A-Z44).

8. Exception is further taken to the failure to report regarding the bids represented by Com. Exs. 2442 (Missouri) and 366-B (Fort Riley) as follows:

The Sales Manager of the company testified that Nebraska's prices to the State of Missouri in 1932 were the company's going commercial prices at the destinations in question. These prices were taken from the company's price cards, compiled currently from reports of salesmen (Tr. 42086; 42084-85; 42007). The company has kept such price records for more than ten years (Tr. 42103-04). Nebraska submitted bids only at thirteen destinations out of some 130 destinations at which the state requested prices, because its prices would have had to be too high in view of the freight rates involved to the other points

(Tr. 42084; 42086). The Sales Manager of Nebraska testified that it had no agreement or understanding with competitors regarding its prices or its bid on this letting nor does it ever have foreknowledge as to the prices of other companies or the prices they will bid on public lettings (Tr. 42086; 42085; 42088).

Nebraska responded to the Government's invitation for a destination price at Fort Riley (Com. Exs. 366 B, E) with a bid which was 17 cents lower than its regular commercial price for cement at that point. The Sales Manager of Nebraska testified concerning this letting as follows:

> "Q. Now, with respect to this bid at Fort Riley, Kansas, in May of 1937 can you tell us why you furnished no f.o.b. mill bid on that invitation? A. In the first place, we were not impressed with the fact that the Government was interested particularly in mill bids. It was my own idea that the Government was interested in buying the cement at the point of destination of use as low as it could buy it. We have no land-grant rate from Superior. We investigated through the Union Pacific and other railroads at various times, and found that there were land-grant rates from other mills to Fort Riley. There was only one way, therefore, that we could place ourselves in position to make an intelligent bid that meant anything to the Government, and that was to try to determine what the lowest combination from any mill that might be bidding, of the mill base and the land-grant rate, and that seemed to figure around $2.15 at that point, which, by the way, gave the Government a price which was about 17 cents under our regular commercial price to a dealer at that point" (Tr. 42053-54).
>
> "Q. Now, is there any influence,—anything which restrains you from bidding f.o.b. mill if you should decide in your own mind that you wanted to do so? A. Well, there is no outside influence, no. It is purely our own local proposition with our trade that would govern as to whether we wanted to do it or not.
>
> "Q. Do you have any understanding or any arrangement with any other cement company with respect to bidding f.o.b. mill? A. No, we have none" (Tr. 42055).

9. Exception is taken to the total failure to report the evidence regarding Nebraska's price policies. This evidence shows the following:

Nebraska, since 1918, at least, has sold largely at delivered prices. The company is primarily a price follower; *i. e.*, it determines what the lowest prices are and meets or beats them (Tr. 42005-07). The Sales Manager testified that no information regarding prices is obtained from competitors and Nebraska has no understanding or agreement with competitors regarding prices (Tr. 42005-07; 42003-05). Nebraska's price policies have not changed since at least 1918 (Tr. 42005-06).

There have been several instances when price increases initiated by some competitor of Nebraska have not held (Tr. 42013-14).

Nebraska has never had any definite practice with regard to the date on which it makes its new prices effective, either when they represent price increases or when they represent price reductions. The company's practice in this regard is solely a matter of judgment on the part of the sales manager who considers all of the circumstances affecting the case of every customer and decides on the basis of fairness in each particular case called to his attention by the customer (Tr. 42014-15).

Although Nebraska sends printed quotations of its prices to customers, it does not always adhere to them. As to price concessions the sales manager of Nebraska testified further as follows (Tr. 42009-10):

> "Q. Will you tell me under what circumstances you do not adhere to them? A. Those prices merely serve generally as a pattern. In other words, they give a general idea of what the price is for the benefit of the dealer and the contractor, but competitive conditions in our territory have been worse, probably, than any other place in the United States, and for the last 15 years or so, and it has necessitated our meeting prices that were other than and below those that are published by our competitors, at least some of them.
>
> "Mr. MacIntyre: May we have the time fixed on this?
>
> "Mr. Werle: The witness said the past 15 years.

"*By Mr. Werle*:

"Q. Is that correct, Mr. Hoenig? A. Fifteen years or more.

"Q. Tell me how you find out about these variations from the quoted prices, Mr. Hoenig? A. We find out through the dealers,—if the dealers are involved, through the contractors, whom we cultivate very intensively, whom we regard as very good friends, so much so that they become confidential with us; sometimes we resort to methods that are used for checking purposes, such as making check offerings, testing the market with a price that we suspect is below the published price to see whether it appeals to the contractor, especially when that contractor has committed himself to us for all or part of the business and does not give it to us, which creates, as a result, a strong suspicion that he has a price. We resort to—we check it in every way that we possibly can, through the dealers for example, on the evidence that they are able to secure on the jobs that they are trying to sell, checking along with us, with their competition. We have many different ways that satisfy us that there are secret prices, just the same as any circumstantial evidence in a case in court will satisfy a jury to that effect" (See also Tr. 42010-11; 42082-83).

Prices in the area where Nebraska sells, frequently, but by no means always, appear to reflect a base at some mill (Tr. 42015-16; 42173).

10. Exception is further taken to the failure to report the following testimony of the sales manager of Nebraska regarding Com. Ex. 2237 which he wrote and which is cited in the report as bearing on "communications":

George Short mentioned therein, is the sales manager of the Three Forks Portland Cement Plant, one of the Ideal operated companies, and Mr. Lundy is his assistant (Tr. 42017). The memorandum was written in 1934 and 1935. This was an isolated instance of an exchange of information with sister company. It was not Nebraska's custom to exchange information with Mr. Short and Mr. Lundy (Tr. 42017-18).

Mr. Rockwell mentioned in the memorandum, was sales manager of the Ash Grove Portland Cement Company in

Omaha. He was dead at the time of the hearings. This was the only occasion that Nebraska exchanged information about prices with Mr. Rockwell. The exhibit shows on its face that it referred to existing prices and not future action; and no understanding or agreement regarding prices was intended or resulted (Tr. 42018; 42020).

11. Exception is further taken to the failure to report regarding Resp. Exs. 3421 and 3422 (cited as evidence of "dealer policies") that the sales manager of Nebraska testified at length regarding the adoption and issuance of these policies and further, generally regarding the dealer policies of the company as follows:

Nebraska has 1,800 to 2,000 dealers or prospective dealer customers whom it solicits constantly and from whom it obtains information as to competitive activity. Dealers are of paramount importance to the company (Tr. 41962). The function they serve and the services they render were shown fully (Tr. 41062-63). The testimony of the sales manager further shows that Nebraska has never had any agreement or understanding with its competitors or anyone else with regard to whether any particular persons should or should not be sold as a dealer (Tr. 41963-64). It sells to some dealers whom its competitors do not solicit and its competitors sell to some dealers whom Nebraska does not consider to be dealers (Tr. 41963-64).

Nebraska has always sold its cement to state and federal authorities and to certain other classes of customers at the same price it charges its dealers. During the effective period of Article XI of the NRA Cement Code, Nebraska sold its cement according to the classifications stated therein, none of which required any change in the way the company had been selling its cement many years prior thereto (Tr. 42067-71).

After the suspension of Article XI of the Code, Nebraska continued to try to sell its cement as it always had. On March 5, 1935, Nebraska issued to its trade a written announcement of its policy, to meet similar announcements of certain of its competitors that it had learned of in the field. Subsequently, on April 25, 1935, Nebraska issued a second announcement of its policy de-

signed to clarify certain problems that had been brought to its attention by its dealer customers following upon the publication of the first announcement (Resp. Exs. 3421 A-B; 3422; Tr. 42071-73; 42076-81).

The sales manager testified that members of his organization have never attended any meetings with any of its competitors with regard to sales policies and have not had discussions with any of competitors regarding the subject matter of its policies of March 5 and April 25, 1935. He further testified that Nebraska did not issue either of these policies as the result of understanding or agreement with any of its competitors and has never had any advance knowledge of what action any of its competitors intended to take with regard to their sales policies (Tr. 41963-64; 62064; 42071; 42073; 42076-77).

12. Exception is taken to the failure to report that the terms and conditions of sale for Nebraska covering the period from 1918 to 1937 are in evidence and that during the entire period of its existence Nebraska has independently drafted and used its own contract and order forms (Resp. Exs. 3411 A-G; Tr. 42024-26).

13. Exception is further taken to the failure to report that invoices of Nebraska relied on in the Report (Par. 93[a]) do not show the actual prices at which Nebraska made the sales in question (Tr. 42082-83).

Paragraph 50

(*North American*)

1. Exception is taken to the unfair, misleading and inadequate portrayal of the practices and policies of North American in Paragraph 50 and the citations thereto and to the failure fairly to report the substantial evidence regarding North American referred to in Exceptions 5-15, below.

2. Exception is taken to the implication suggested by Paragraph 82 and the footnote at page 9 of the Report that North American is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged practices or policies of the Institute other than those authorized and contemplated by its Articles of

Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See exceptions to Paragraphs 1-6, *supra;* and further below).

3. Exception is further taken to the assertion in Paragraph 82 and in the footnote at page 9 of the Report that North American is "identified" or connected with "group" activities or industry policies and practices. There is no evidence to support the statement and none is cited.

4. Exception is taken to citation (Tr. 37079) in connection with North American's policies as to pricing as it has no bearing on North American.

5. Exception is further taken to the failure to report that in addition to the Vice-President in charge of Sales of North American who was called as a witness by the Commission, the President of the company appeared as a witness on its behalf and testified concerning the subjects at issue and the evidence affecting North American (Tr. 33735-34149). This testimony included all subjects referred to in Paragraph 50 and showed that the practices and policies of the company have been arrived at independently without agreement, understanding or collusion with any competitor (See citations below).

6. Exception is taken to the failure to report the following evidence regarding North American, generally:

Its cement plants are at the site of ample reserves of raw materials and are well situated to serve important markets. None of its plants was located or acquired in consideration of any particular method of pricing (Tr. 33739-46; 33757-59). The plant at Catskill, last to be acquired (1926), was purchased at a period of heavy demand when the company's existing plants were operating at substantially full capacity (Tr. 33759; 33764-65). Improvements in equipment and methods of manufacture have since increased the theoretical capacity of all North American plants (Tr. 33761-62), but higher and increasing numbers of specifications have in turn reduced actual capacity (Tr. 33766).

The area into which North American ships from each of its mills has not changed substantially since it acquired

them except that some areas have been abandoned because of low prices and better service by competitors (Tr. 33814-15; 33792-93).

The company operates silos in Washington, D. C., where customers obtain delivery to their trucks. This method of distribution was adopted at great cost to North American to meet a similar arrangement introduced by a competitor (Tr. 33922-32).

7. Exception is taken to the failure to report the following evidence regarding North American's membership in The Cement Institute:

North American had no connection with The Cement Institute and received none of its services prior to 1933. The company joined the Institute at that time solely for the purpose of participating in the N.I.R.A. program (Tr. 33907; 33912). Contemporary documentary evidence regarding the considerations which motivated North American in joining the Institute in 1933 was rejected by the Trial Examiner (Resp. Ex. 2402 for id. Tr. 33908-11). The Institute did not concern itself with prices or affect or influence any of the marketing practices or policies of North American (Tr. 33918-19; 33914-15). It has not affected or influenced the production or capacity of North American's plants and North American has never had any arrangement with competitors regarding production or shipments (Tr. 33763-64; 33776-77; 33779-80; 33785-92; Resp. Ex. 2395).

8. Exception is taken to the failure to report the following evidence regarding the pricing and bidding policies and practices of North American:

North American sells largely at delivered prices and by and large for many years has been a price follower, *i. e.*, the company has met the lowest price found in a given market, or if it could not afford to meet it, made no attempt to sell there (Tr. 33792; 33794; 33806; 33814). This is the company's practice on public bids as well as on commercial sales (Tr. 8059-60). Basing points are used in an indirect sense, *i. e.*, competition is met at destination, but on the occasion of changes in prices an attempt is made to determine

if such changes relate to a constant figure at some mill or have any other pattern. If so, the company will adopt the pattern in order to meet the lowest prices found but it is constantly aware of delivered prices in its sales area and relies solely on its day to day check of delivered prices in each market in determining its prices and does not rely on the existence of any particular pattern (Tr. 33806-07; 33818-20; 7513; 8059-60; 8248-49; 8260-61; 8269). However, in those areas which individually constitute North American's largest single markets, and which together account for a very substantial portion of its total shipments, a basing point pattern has seldom been found in recent years (Tr. 7521-23; 3739-41; 6298-99; 8210-11; 6812; 6042-43; 26823-24; 23061-62; 4487; see also exceptions to Paragraph 151, *infra*). The company also has quoted prices lower than its published prices (Tr. 34149; 34043; 33795).

On four occasions in recent years, North American assumed price leadership because of competitive conditions. The company depressed its prices in the Baltimore area in 1936, in an attempt to make that market less attractive to foreign cement, as well as to discourage increasing shipments into that area by Lehigh Valley mills (Tr. 33794; 33864-66; Resp. Exs. 2401; 3715; Com. Exs. 551-2C-2D; Tr. 8259). Subsequent adjustments in these prices have been made by North American in order to put its customers in that area who were in competition with each other on an equal competitive basis (Tr. 33870). Its lower prices caused no material reduction in competitors' shipments into Baltimore (Tr. 33867; 8259). The President of the company who authorized this change in prices testified that it was not done through any understanding, agreement or cooperative action with competitors (Tr. 33869-70).

In the previous year North American adopted an experiment in the Brooklyn market by placing a stock of cement on a barge at the waterfront from which delivery was made to customers' trucks at a special f.o.b. truck price. The purpose was to attempt to meet "in kind" the imported cement competition at that point (Tr. 8257-58). This stock was carried there for several months before the experiment was abandoned by North American. North

American's President and Vice-President in charge of sales explained fully the circumstances under which this means of selling and pricing was adopted and abandoned, and the testimony of each showed that it was not attended by an agreement or understanding with competitors (Tr. 8257-58; 33862-64; 33859-60; see also exceptions to Paragraphs 155 and 156, *infra*).

Several years ago North American initiated the use of prices reflecting a base at its Howe's Cave, N. Y. mill and subsequently discontinued this policy (Tr. 8252; 34035; 34078-79).

The most recent price move initiated by North American was the use of prices reflecting a base at its Security, Md., mill. This affected a general reduction in prices in the area immediately surrounding the mill. It has not however increased North American's volume of business. The President of the company testified that his decision was not the result of any agreement or understanding with competitors, and that the matter was not discussed with competitors (Tr. 33795-96; 33798; 33808-10; 33814; 33806).

The President and Vice-President in charge of sales of North American both testified that the company's prices have always been arrived at independently, without discussion with or prior notice to any competitor, and that the company has no agreement or understanding regarding the prices it quotes, or its methods of determining those prices (Tr. 33921-22; 34002; 34007; 34038-39; 34043-44; 33895-96; 8252-52; 33839; 33869-70; 33986; see also exceptions to Paragraphs 88-92, *infra*).

The company has no policy against f.o.b. mill sales, but customers prefer to buy at destination prices. If it were thought good business for North American to sell f.o.b. mill it would do so (Tr. 8252-53; 8247-48; 33904-05; 34000-01; 34119; 34146; see also Tr. 33875-77; 33897-98; 33899-901; Resp. Ex. 41; Tr. 33902-04). The company does not sell or ship in areas where land grant rates are available to the government (Tr. 33984).

The President of North American was prepared to testify fully regarding the level of the company's prices and the factors which the company has considered from time

to time in determining whether it could afford to lower its prices. Some testimony on this subject was permitted, and showed that the per barrel cost of North American cement apart from certain fixed costs, depends almost entirely on volume. Lowering prices within the limits permitted by the desire to have a profit, tried by North American on a few occasions, did not increase volume because such lower prices were met by competitors. Company records show that North American could not lower prices to the point of driving competitors out of local markets and still realize a profit (Tr. 33825; 33837 33838-40; 33867; 8259). These records were rejected by the Trial Examiner (Resp. Exs. 2397 for id.; 2398 A-E for id.; Tr. 33827-34).

9. Exception is taken to the failure to report regarding Com. Exs. 303 D, 1096 B and 1099 W (cited in Paragraph 50) that North American's prices were the current commercial prices at the destinations involved (Resp. Exs. 915-19; 902; 903; 906; 945; 946; 763; 764; 766; 767; 744; Tr. 9059-60). Exception is further taken to the failure to report that many of these prices were not related to any basing point (Com. Exs. 551 O, V, X, 2C; 1166; Resp. Ex. 3715).

10. Exception is taken to the failure to report the following evidence regarding the dealer policies of North American:

North American has some 900 dealers through whom its cement is delivered to the ultimate consumer in small quantities with proper service and facilities to meet their normal day to day demand. This distribution is the backbone of the business of North American. From 1926 to 1933 an average of 84% of its cement was sold through dealers (Tr. 33896). The company's President testified that the company's selection of dealers is based on its independent determination without understanding or agreement with competitors; and that none of the company's dealer policies has been affected by The Cement Institute, nor have any of them been adopted or followed as the result of agreement or understanding with competitors (Tr. 33919-20). North

American's sales policies are determined by the necessities of competition. It must follow competitive policies which afford the slightest advantage to customers or lose business. The President of North American testified that at no time has there been any understanding with competitors as to sales policies (Tr. 33920-22).

11. Exception is taken to the report "as to the meetings" on the ground that it is a prejudicial and inadequate report regarding the evidence relating to North American's participation in meetings. Com. Ex. 1199 A cited as one of two meetings in which North American participated does not concern or refer to North American, but refers to a meeting in the offices of Northwestern Portland Cement Company at Seattle, Washington.

The other meeting cited was a meeting of the Portland Cement Association. Exception is taken to the failure to report that the President of North American testified that meetings of this association were concerned only with the formal business of the association and the technical phases of manufacture (Tr. 34013; 33984-85).

12. Exception is further taken to the failure to report that the President of North American testified further that he never heard any discussion of prices or marketing policies at any meeting (Tr. 33920-21; 33986; 34008-10) and that North American had no understanding with competitors as to sales policies, pricing policies or future prices or policies at any time (Tr. 33921-22; 33806; 33816-17).

13. Exception is further taken to the failure to report the following evidence regarding North American:

The President of North American testified that the company's practices with regard to delivery to trucks were arrived at independently, and that North American had no agreement or understanding with competitors about truck delivery. Moreover North American does make delivery to customers trucks at one of its mills and at its Washington silo, where competitive conditions have made it advisable and necessary (Tr. 33845-46; 33932-33; see also Tr. 33848-50).

14. Exception is further taken to the failure to report the following evidence regarding imported cement competition as it affected North American:

North American with its three plants within easy reach of eastern seaboard markets, is more seriously affected by imported cement than most other manufacturers (Tr. 8264-65). The steps it took in establishing a stock of cement in Brooklyn and depressing its prices in the Baltimore area were direct attempts to compete with foreign cement. The company never had any policy of refusing to sell to dealers handling foreign cement, although for a short period in 1935, North American stopped soliciting such dealers (Tr. 33871-73). This was not the result of any agreement with competitors (Tr. 33874-75).

15. Exception is taken to the failure to report concerning the various engineering, chemical and other technical services afforded by North American to certain of its customers and are a very important consideration in the price tified that these services are worth a great deal to customers and are a very important consideration of the price the customer pays for cement (Tr. 33954); also that similar services are rendered by some, but not by all, of North American's competitors, and that, in the case of those competitors who do render services, such services are not identical with those rendered by North American, because the service rendered varies in each individual case (Tr. 33954-55). More detailed evidence as to the nature and value of these services was rejected by the Examiner. In this connection, exception is also taken to the unsupported implication in Paragraph 228 that Hercules was the only company which rendered engineering services different from those of its competitors.

Paragraph 52

(Northwestern States)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Northwestern States Portland Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement

Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Northwestern States is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the vice-president in charge of policy and sales of the Northwestern States company testified at length concerning the origin and use of the company's various practices and policies. This testimony was directed to the charges in the complaint as well as to evidence offered by Commission's counsel, including all subjects referred to in Paragraph 52 of the Report; and it showed that none of the company's practices and policies have been the result of agreement or understanding with anyone (Tr. 36445-707).

4. Exception is taken to the statement that Northwestern States is a West Virginia corporation because it is contrary to the evidence. Exception is further taken to the failure to report that in April, 1934, all of the assets of Northwestern States, the West Virginia corporation, were transferred to an Iowa corporation of the same name (Tr. 36475).

5. Exception is taken to the failure to report the following evidence regarding the organization, location and marketing area of the Northwestern States company:

None of the company's officers or directors are officers or directors of any other cement company nor is the company affiliated with any other cement company (Tr. 36476-77).

Mason City was chosen as the plant site because of its favorable location with respect to raw materials and available markets. The company increased the capacity of

its Mason City plant and has kept it in efficient operating condition at all times by improvement, replacement and modernization of its facilities (Tr. 36452; 36475-76). Evidence showing the improvements made, their cost and their effect on the company's total costs of production was stricken from the record by the Trial Examiner (Tr. 36476).

Northwestern States purchased its Gilmore City plant in 1926 when demand for cement in the company's marketing area was good. Beginning in 1929, demand decreased sharply and in 1930, the company shut the Gilmore City plant down because the capacity of its Mason City plant was more than enough to supply its entire trade. It has not operated the Gilmore City plant since 1930 (Tr. 36475).

Northwestern States has no warehouses or silos (Tr. 36475).

The original capacity of the Mason City plant was 1,000,000 barrels per year. Its present annual capacity is about 2,100,000 barrels. The Gilmore City plant is capable of producing annually between 350,000 and 400,000 barrels. The company estimates the Mason City capacity on the basis of what that plant has actually produced. It has never operated its Gilmore City plant for a full year and the Gilmore City capacity is estimated on the basis of what that plant has actually produced during periods of a year that it has operated (Tr. 36449-52; 36455; 36465-66; 36655; Resp. Ex. 2711).

The company's shipments fluctuate sharply according to the season of the year, the low point occurring during the winter months. To permit operation of the Mason City plant at as full capacity as possible during the winter months, Northwestern States has increased its storage capacity from 400,000 barrels of finished cement to 700,000 barrels (Resp. Ex. 2711; Tr. 36452-54; 36456-57).

Northwestern States makes no use of capacity figures in determining the rate at which to operate its plant. It determines its rate of operations according to current and prospective demand in the area in which it markets cement. It determines current and prospective demand on the basis of orders on its books and of reports of conditions in the field sent in weekly by its salesmen (Tr. 36454-56). The

company also makes use of reports on shipments into states received from the Bureau of Mines. From these reports, it tabulates total shipments into states in which it does business. These tabulations enable the company to ascertain the amount of cement currently being used in those states as compared with the amounts used in previous years (Tr. 36466-67; 36469-70). It makes no use at all of statistics on production of cement and clinker and on stocks on hand (Tr. 36467).

Northwestern States has never consulted with W. S. Mallory with regard to the capacities of its plants or any other plants nor has it ever paid any attention to Mallory estimates of plant capacities (Tr. 36466-67; 36492).

Northwestern States markets its cement in the States of Iowa, North Dakota and Minnesota and in the western half of the State of Wisconsin. Its salesmen solicit business in all of this territory. The company ships an occasional car of cement into Nebraska, South Dakota or Illinois when requested to do so by a friendly contractor customer or by an old dealer customer. In the area in which it solicits business, it encounters regularly the competition of 15 other companies (Tr. 12621; 36477-78).

The company formerly solicited business in northeastern Nebraska and in South Dakota. It withdrew from the Nebraska area when a new plant at Louisville, Nebraska, went into operation because its salesman could no longer sell enough business to pay his expenses. In 1925, when the South Dakota state plant went into operation, Northwestern States withdrew from South Dakota entirely even though it had always realized a good return on its business in that state. Just prior to the time that the South Dakota plant went into operation, Northwestern States' dealer customers in that state were fearful that the new plant would ignore them and sell all of its cement direct to consumers. When the new plant went into operation, its management adopted all of the pricing and marketing practices that the Northwestern States company had previously been using in South Dakota and the entire dealer trade in the state switched over to the South Dakota brand so that the state plant would continue the policies it had

adopted. Northwestern States was thus out of the market (Tr. 36540-41; 36543-44; 36632-33).

Owing to increasingly intensive competitive conditions the company has gradually increased its sales force and has tried to concentrate its sales efforts in areas close to its mill (Tr. 36477).

Northwestern States has never operated pursuant to any plan for allocating business or territory nor has it ever traded orders with anyone. The evidence is that the company has never had any agreements with anyone in this regard (Tr. 36467-72; 36492-93).

6. Exception is taken to the failure to report the following evidence regarding the membership of Northwestern States in The Cement Institute:

The Institute has never formulated or interpreted or attempted to formulate or interpret any of the company's policies nor has the company ever requested the Institute to do so (Tr. 36484; 36490; 36491-94; 36496-97; 36500; 36502-05; 36507-08; 36516-17).

In 1930, the vice-president of the company served on the Advisory Committee of the Chicago branch of the Institute. The function of this committee was to hire a manager for the Chicago branch, rent office space and otherwise to arrange for office personnel. The committee at no time concerned itself with prices, capacities, contracts, policies or practices (Tr. 36490; 36491-92; 36496-97).

The company participated in the Institute's contract reporting service and considered it of value in enabling it to discover duplicated or "padded" contracts on its books. Once having discovered such duplication or "padding" the company's decision as to the action it would take was always independently arrived at. Neither the Institute nor any of the company's competitors had anything to do with any action the company might take. The evidence is that Northwestern States has never had any agreement with anyone regarding contract cancellations (Tr. 36495-97; 36499-506).

Northwestern States has never used the freight rate books issued by The Cement Institute but has always

compiled its own freight rate information from official tariffs. The company keeps a card index file containing a card for every destination in its marketing area. On each card appear the rates per cwt. from its own shipping point and the shipping points of all companies whose competition it encounters to the particular destination. In addition, the card contains the routing from Mason City. All tariff changes are noted on the cards affected and each card is thus kept currently up to date. From this master set of rate cards, the company compiles freight rate books which it uses as the occasion requires in the day to day operation of its business. These books contain freight rates per cwt. from Mason City and from competitive mills but contain no routing information. Each book also contains a conversion table which is used to convert rates from cents per cwt. to cents per barrel. The company has always used such tables and has always compiled them ifself. The company's rate cards and rate books carried the correct rates to points to which rates shown in the Institute books of the same date are contended to have been in error (Resp. Exs. 2717 A-F; 2718 A-D; 2719 A-B; Tr. 36568-73; 36578-79; 36582-93; 36598; 36601-05).

The company's own books are easy to compile and keep up to date because the freight rates it has had occasion to use have all appeared in relatively few tariffs. At the time the Institute rate service came into being, the company decided to continue its own books because it did not, for any period of time, want to be without freight rate information should the Institute service be discontinued (Tr. 36677-78; 36693-94).

Northwestern States receives one copy of each Institute book for states in which it sells cement but at all times and for all purposes uses the official tariff rates as reflected by its own freight rate cards and books (Tr. 36569-70; 36600-05).

7. Exception is taken to the failure to report that the invitations to bid for the lettings referred to in Com. Ex. 1909 and Com. Ex. 1912 (cited in Paragraph 52) called for delivered prices only and specified that freight be prepaid (Com. Exs. 1917 B-C, G; 1920 C, G). Exception is further

taken to the failure to report that Northwestern States did not quote prices at many of the destinations listed because it could not afford to quote prices low enough to have been competitive at those points (Com. Exs. 1909; 1912; Tr. 36622-23; 36625-26; 36628-29). Evidence showing that the company independently arrived at the prices it bid on the letting referred to in Com. Ex. 1912 was rejected by the Examiner (Tr. 36625-26; 36628; 36631-32; Resp. Exs. 2725 A-C for id.).

8. Exception is taken to the erroneous implication that Com. Ex. 166 relates to a bid of June 5, 1936 and to the failure to report that this letting occurred on June 5, 1934, during the period of open price filing under the NRA Cement Code and that Northwestern States had been notified by the Code Authority of the lowest price on file, pursuant to Code provisions (Com. Exs. 164 i, j).

9. Exception is taken to the failure to report the following evidence regarding the bidding policies and practices of the Northwestern States company:

The company has bid prices to governmental agencies which were not identical with those quoted by competitors (Com. Exs. 1339; 1908; 1914; Resp. Ex. 2714; Tr. 10025).

The company quoted an f.o.b. mill price in response to the U. S. Treasury Department Procurement Division invitation of March 1938. This bid was unqualified except that the company limited the quantity it could be called upon to ship, the invitation being indefinite in this respect. It had no consultation with any competitor with regard to its action in response to this invitation. After it had bid, many of its dealer customers entered protests with it (Com. Ex. 1339; Resp. Ex. 2714; Tr. 36548-52). Further evidence showing the reasons why the company's customers protested its action was rejected by the Examiner (Resp. Exs. 2715 A-R for id.; Tr. 36552-55).

The Trial Examiner rejected further evidence regarding f.o.b. mill bids by Northwestern States to the federal government (Resp. Exs. 3660-Z16, Z22 for id.; Tr. 47700-04).

Northwestern States has submitted f.o.b. mill bids on state highway department lettings (Com. Exs. 1884; 1888; 1899; Resp. Ex. 990 A).

The company has never withdrawn or requested to withdraw any bid it had made to a state or federal agency (Tr. 36555).

The company never filed land grant rate information with The Cement Institute and never exchanged such information with competitors (Tr. 36562).

The evidence is that the company has never had any agreement with anyone regarding the so-called "control clause" (Tr. 36564-66).

Northwestern States has never considered itself obligated to employ any particular method of quoting in bidding to the federal government and has never had any consultation with any competitor regarding any bid it has submitted to any state or federal agency. The evidence is that it has had no agreements with anyone regarding its bids or bidding practices (Tr. 36510; 36514-17; 36547-48; 36552; 36562; 36566; 36625-26; 36647).

10. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of the Northwestern States company.

The company has always sold its cement at delivered prices and in so doing it has always attempted to meet the lowest prices quoted by any competitor at destination whether or not such prices appear to reflect so-called price bases (Tr. 36481; 36482; 36448; 36638-39).

The company secures its information with regard to the prices being quoted by competitors from its salesmen who, pursuant to instructions, constantly check prices in the field and report any changes in competitive prices or practices to their home office; direct from its customers; and from official tabulations of bids. The company has no other sources of information (Tr. 12762; 36480-81; 36635-39). Through these sources, the company receives information with regard to price changes initiated by competitors almost as soon as competitive quotations are in the hands of the trade. As soon as it learns of a change at one point, Northwestern States gets in touch with dealers and sales-

men at other points in order to ascertain whether there have been other changes. Once satisfied that there actually has been a change, the company meets the new prices if they are lower and, if they are higher, decides whether or not it will follow. When it changes its prices, the company sends quotations to all customers, actual or prospective, in the area in which it solicits business (Tr. 36481).

The company keeps records of all of the prices it is currently quoting. These records consist of a card for each destination at which it has quoted a price and on each card appears the name of the customer to whom a quotation has been sent and the current price the company is quoting him (Tr. 36580-82; 36607-08). Further evidence regarding the company's practice in this regard was rejected by the Examiner (Resp. Exs. 2720 A-Z29 for id.; Tr. 36608).

Northwestern States has found that competitive prices it finds in the field, after deduction of freight, usually reflect so-called price bases. When the company is satisfied that price changes have taken place, it does not check every destination in its marketing area before sending out its quotations. If analyzes the new prices it has learned of by trying to learn whether or not price bases are reflected and, if so, anticipates prices at points from which it has no specific information. The company keeps a record of mill bases and the amounts thereof that it has found reflected in prices quoted in its marketing area. The source from which it makes up this record is the delivered prices it finds in the field. It does not publish the record in list form (Com. Exs. 2192 A-B; Tr. 36482; 36483; 36615-16).

The company has no assurance that the prices it anticipates and quotes in this fashion will be the lowest prices quoted at the destinations involved nor does it have any foreknowledge of which mills are so-called bases or of the amount of the base at any particular mill. It has never received from competitors any information as to prices or bases in the form of lists or otherwise nor has it ever sent any such information to its competitors or had any discussion with competitors with regard to prices, or price

bases. The evidence is that the company has never had any agreement with anyone with regard to the establishment or maintenance of any mill as a base mill or the amount of the base at any mill or with regard to any of the prices it charges for its cement (Tr. 36482-83; 36517; 36546-47; 36614-15).

Northwestern States filed prices with the NRA Code Authority for the cement industry when the NRA Cement Code became effective. It took the prices it filed from its current delivered price records. There was no restriction on the kind of prices the company could file. It stopped filing prices at the time of the *Schechter* decision and filed none with the Institute Trade Practice Committee (Tr. 36503-04).

It has been the company's experience that its competitors have always quoted and sold cement at cut prices. It has also found that its friendly customers give it a chance to meet such price cuts and the company has frequently availed itself of the opportunity by quoting cut prices. Northwestern States' sales at cut prices have been substantial. Its sales to contractors for Iowa State highway work alone in some years since 1933 have amounted to well over 10% of its total sales to such contractors (Tr. 36612-14; 36645-46; 36681-82; 36697-700; 36702).

11. Exception is taken to the failure to report the following evidence regarding dealer policies and practices of Northwestern States:

The company's dealer customers have always been the chief outlet for its product. Through the years, it has made an average of over 65% of its sales to dealers. At the present time, it ships cement from time to time to 1400 dealer customers, most of whom also handle other brands of cement (Tr. 36485; 36519-20).

The company has always required that a person must have certain qualifications before it would sell to him as a dealer. Its policy in this regard has always been flexible and its decision has always been based on the individual case as determined by local conditions. The general qualifications the company bore in mind had always been about the same as those contained in the written definition of a

dealer appearing in Article XI of the NRA Cement Code (Tr. 36483-84).

Northwestern States has always been free to sell to anyone as a dealer whom it chose to. Neither the Institute nor any competitor has ever had anything to do with the company's policy in this regard and the evidence is that its policy has never been the result of agreement with anyone (Tr. 36484-85).

The company has always sold its cement, at the same prices it charges its dealers, to concrete tile plants, to railroads and, when the occasion arises to state and federal governments. Article XI of the NRA Cement Code, with some exceptions, effected no substantial change in the company's policy. The Article did provide, however, that certain types of customers should be sold direct whom the company had not previously sold. While the Article was in effect, the company refrained from soliciting these types of business and followed a policy of not quoting direct on any business that it had not been quoting direct prior to the Code. After the Article was suspended, the company resumed solicitation of business on the same basis it had before the Article came into existence (Resp. Exs. 2712 A-G; Tr. 36517-22; 36524-29; 36643-44). The company never attended any meetings where Article XI or modification of it was discussed and never had any discussions with representatives of dealer associations regarding it (Tr. 36521-23).

In February of 1935, Northwestern States learned through its salesmen that a competitor had circularized the dealer trade with an announcement of policy regarding classes of customers. The company took no action with regard to this other than to notify customers who inquired that its policy would continue unchanged. Subsequently, in April, 1935, the company learned of a second competitive announcement of policy in the field. Because this announcement met with favorable reaction among its dealer customers, many of whom asked Northwestern States to declare its policy, the company, on April 18, 1935, published to its trade an announcement which followed verbatim the competitive announcements which it had

found in the field (Com. Ex. 1907; Resp. Exs. 2712 D-G; 2713 A-M; Tr. 36529-33; 36535-36; 36538).

The company's announcement of April 18, 1935 outlined a policy which in substance was about the same as the policy it had been following. It had never followed any policy rigidly and the fact that it had finally publicly announced a policy did not change its practice in this regard. It has continued to place its own interpretation on its policy and on frequent occasions has deviated entirely from its provisions (Tr. 36521; 36533; 36538-39; 36563-64; 36643-44).

The evidence is that Northwestern States has never had any agreement with anyone regarding the classification of business or customers (Tr. 36520; 36538-39).

12. Exception is taken to the citation in Paragraph 52 of Tr. 12634; Com. Exs. 2197-98; 3235-Z82 in connection with "meetings" of the Northwestern States company because they do not relate to that subject.

13. Exception is taken to the failure to report that the evidence shows that Northwestern States has never had any agreement with anyone regarding its terms of sale or discount (Tr. 36609-11; 36612). The Trial Examiner rejected evidence showing independent action by Northwestern States with respect to this matter (Resp. Exs. 2721 A-D for id.; Tr. 36611-12).

14. Exception is taken to the failure to report the following evidence regarding the company's policy toward diversions of its cement in transit:

Northwestern States has always been opposed to diversions and has always tried to prevent them. The reason for its policy is that a diverted shipment is likely to turn up at a point where the company has a regular dealer customer whose good will it values more than that of the person securing the diversion (Tr. 36487).

The company has never had any serious problem with diversions and has never had any discussions or contacts with competitors regarding it. The evidence is that it has never had any agreement with anyone concerning its policy (Tr. 36487).

15. Exception is taken to the failure to report the following evidence regarding trucking policies of the Northwestern States company:

The company has never had any demand for deliveries to customers' trucks at its Mason City mill except for a short period in the early 1920's when there was a railroad car shortage (Tr. 36486; 36642; Com. Exs. 975-2F).

When the company purchased its Gilmore City mill in 1926, deliveries were being made to customers' trucks at that plant at the delivered price with freight allowed. The company continued this policy as long as the Gilmore City plant was in operation (Tr. 36486).

The amount of cement delivered to customers' trucks at its plants never comprised more than a negligible portion of its total shipments (Tr. 36486).

The company never charged 15¢ or any other amount as a premium for delivery to customers' trucks at plant. It never made deliveries in its own or in hired trucks (Tr. 36486).

The evidence is that it never had any agreement with anyone regarding its trucking policies or practices (Tr. 36487).

The company never took any part in any efforts to secure short haul freight rates (Tr. 36599).

16. Exception is taken to the failure to report that water transportation is not available from either of the company's plants (Tr. 36488).

17. Exception is taken to the failure to report that Northwestern States has never declined to make cement in accordance with any specification a customer might request; that the company has never had any contact or discussion with any competitor with regard to cement specifications; that it has never had representation on any committee dealing with cement specifications; that it has never taken any steps toward the elimination of special specifications for cement; and that The Cement Institute has never had anything to do with the specifications to which the company produces its cement (Tr. 36478-80; 36517).

18. Exception is taken to the failure to report that Northwestern States has never come into competition with imported cement and has never taken any steps or had any agreements with regard to it (Tr. 36488).

Paragraph 53

(*Oklahoma*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Oklahoma Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Oklahoma is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the implication in Paragraph 53 that the practices and policies of Oklahoma conform to or are interrelated with the practices and policies of Arkansas, Colorado, Nebraska, Three Forks and Union, or any of them, and to the failure to report the evidence showing: that the policies and practices of Oklahoma are formulated independently of the policies and practices of the other Ideal affiliates; that there is no arrangement whereby the prices or commercial practices of each of the companies is maintained on the same basis; and that none of the named companies has anything to do with the determination of matters of policy or practice of any other company (Tr. 13889-90; 41967-68; 42117-18; 46441-42).

4. Exception is taken to any implication in Paragraph 53 that any of the policies and practices of Oklahoma have

been adopted or followed as the result of agreement or understanding with any other respondent. Further exception is taken to the failure to report that the sales manager of the Oklahoma company testified fully regarding the development and use of the practices and policies of the company including all the subjects reported in Paragraph 53, and that his testimony showed that Oklahoma's practices and policies were not the result of any agreement or understanding (Tr. 46439-42; 46483; 46498; 46500-01; 46510; 46513; 46515-19; 46534-37; 46539; 46542; 46544-45; 46553; 46560; 46562; 46564; 46570-71).

5. Exception is taken to the failure to report the following evidence concerning the Oklahoma company generally:

Of the two mills located at Ada, Oklahoma, one is dry process and the other, wet process. The former, which was the original mill prior to 1917 when ownership of the company changed hands, has a capacity of about 800,000 bbls. per year. The latter mill, which was built by the new owners a few years after the change, has a capacity of about 1,500,000 bbls. per year. Shipments from Ada vary according to the season of the year. Both of the mills are unit mills so that operating ratio can be geared to correspond with the volume of business the company is able to obtain. Both mills have in the past operated at substantially full capacity (Resp. Ex. 3584; Tr. 46564-66).

The sales manager of the Oklahoma Company does not participate in the determination of matters of policy for other Ideal affiliates nor do they have anything to do with the determination of matters affecting the policies of the Oklahoma Company (Tr. 46440-42).

6. Exception is taken to the failure to report the following evidence with respect to Oklahoma's membership in The Cement Institute:

Oklahoma has never received or used freight rate books published by The Cement Institute (Tr. 46501; 46513-15; 46519). The Cement Institute has never participated in or had anything to do with the formulation or execution of any of the policies of the Oklahoma Company (Tr. 46570-71).

7. Exception is taken to the failure to report the following evidence with respect to the Oklahoma Company's bids:

It has always been the policy of the Oklahoma Company to quote prices on government work in the same manner that it quotes prices on commercial work except that, in addition to quoting f.o.b. destination on government work, the company has always quoted f.o.b. mill when requested (Tr. 137-38; 46525-29; 46532-33; 46537; Com. Exs. 125; 170 A; 175 A; Resp. Exs. 2349-Z4; 2350 P). Further evidence was rejected by the Examiner (Resp. Exs. 3660 Z14 for id.; Tr. 47700-04):

When land grant rates are available to the federal government either from Ada or from some competitive mill, it is the policy of the Oklahoma Company, in making up its bid, to enable the government to obtain the benefit of any such land grant rates. Prior to July, 1937, Oklahoma either quoted a destination cost in conjunction with a control clause whereby the government was to deduct freight to arrive at an f.o.b. mill price for shipment on government bill of lading, or an f.o.b. mill price arrived at by deducting the freight rate, land grant or commercial, itself. Since April 1938, Oklahoma has quoted the federal government f.o.b. mill prices without regard to competitive cost at destination (Tr. 46525-26; 46530-34).

Oklahoma has always obtained the land grant rate information it uses in connection with bids from railroads, from its traffic department or from official tabulations of bids previously taken by the government at the same destination. The testimony shows that the company has never consulted with any competitor with regard to land grant rates to be used in connection with government business (Tr. 46534-35).

Oklahoma adopted and began to use the so-called "control clause" during the NRA Code period after it had learned of the clause from an NRA Code Authority notification of prices filed by some member of the industry. The evidence shows that when Oklahoma used the clause it did not do so as the result of understanding or agreement with any other respondent (Tr. 46435-36).

8. Exception is taken to the failure to report the following evidence with respect to the pricing policies of Oklahoma:

It has been the policy of the Oklahoma company ever since it went into operation in 1908 to quote delivered prices and at a given destination at least to meet the lowest price it finds being openly quoted to customers there by any competitor (Tr. 46484-85; 46617-19). Except for occasional requests for f.o.b. mill prices on the part of the government which have been honored, Oklahoma has never received requests from customers for other than destination prices. The testimony shows that Oklahoma has never had any understanding or agreement with any competitor that it would or would not bid f.o.b. mill nor has it ever considered that it was under any restriction as to prices it could quote (Tr. 46536-37).

Since 1908 Oklahoma has kept current lists of its destination prices at towns in its marketing area. These lists are furnished to the company salesmen and are used for convenience in quoting prices and in invoicing shipments. The company enters the destination price at which a sale is made on its ledger sheets (Tr. 46484-91; 46464-71; Resp. Exs. 3576; 3577 A-Z24).

When it changes its prices, Oklahoma broadcasts quotations to all its customers and prospective customers announcing its new prices (Tr. 46493).

Oklahoma has always kept a list of price bases, if any, which appear to be reflected in new destination prices being quoted by its competitors in its marketing area (Tr. 46497; 46501; 46626-27). The sales manager's testimony showed that Oklahoma has never sent a copy of its price base lists to any competitor nor has it ever received such a list from a competitor; and that the company has never had any agreement or understanding with any competitor as to what mills should or should not be considered base mills (Tr. 46496-97; 46498-500).

The prices which Oklahoma broadcasts to its customers and prospective customers and the prices appearing on its office and salesmen's price lists are the prices at which Oklahoma tries to sell its product. The company has, how-

ever, on many occasions, sold cement to particular customers at prices less than those so published in order to meet prices quoted by competitors. Such sales have always been frequent, and general in extent throughout Oklahoma's marketing territory (Com. Ex. 3093 E-W; Resp. Exs. 3566-76; Tr. 46442-71; 46493-96).

Oklahoma has always considered it necessary, in order to be in a position to act quickly and promptly at the time of competitive price changes, to have freight rates compiled in book form. When the original company went into operation in 1908, one of its first acts was to compile in book form from official tariffs the lowest available freight rates in cents per cwt. from all cement manufacturing points with which the new company believed it would come into competition to all stations in its prospective marketing area at which dealers were located. At the same time, the company devised a table for use in converting freight rates per cwt. into rates per bbl. and adopted in connection therewith the practice of dropping from the per bbl. rate all fractions of less than one-half and carrying on to the next whole number all fractions of one-half and over. Oklahoma continued to use rate books so compiled in 1908 or revisions thereof until 1917 when ownership of the company changed hands. Thereafter and to date, the company has used freight rate books of similar nature compiled and serviced by the traffic department of its new owners. It continued to use its own conversion tables and to follow its former practice with regard to the disposition of fractional rates. It finds the freight rate books it uses satisfactory in connection with analyzing prices and making shipments (Resp. Exs. 3578 A-Z67; Tr. 46501-15; 46520).

Oklahoma has never received or used freight rate books of The Cement Institute (Tr. 46513-14; 46519).

Com. Exs. 967-13 F, cited in Paragraph 53 as relating to Oklahoma's pricing policies, bears no relation to that subject.

9. Exception is taken to the failure to report the following evidence in connection with the dealer policy of the Oklahoma company:

It has always been Oklahoma's policy to sell its cement at dealer prices to dealers and to certain other classes of customers not requiring dealer service including the United States Government (Tr. 46537-39). During the effective period of Article XI of the NRA Cement Code, Oklahoma sold its cement in accordance with the provisions of that Article, none of which represented any substantial change from the policies the company had been followng ever since it had been in business. The only exception to this was that prior to 1928, Oklahoma did not sell cement to contractors doing highway work or to governmental agencies for highway work at dealer prices. By 1928, however, competitors had begun to sell cement for such work at dealer prices and at that time Oklahoma changed its policy rather than forego the business (Com. Ex. 557; Tr. 46537-39).

When Article XI of the NRA Cement Code was suspended, Oklahoma merely continued to sell its cement according to the policy it had been following for years prior to the date of the Code. The testimony of the sales manager shows that the company never had any understanding or agreement with any respondent to continue in effect the provisions of the suspended Article XI (Tr. 46539).

Prior to 1935, Oklahoma had never published to the trade an announcement of its dealer policy. In February of that year, however, competitors of the company issued such announcements to the dealers throughout Oklahoma's marketing area and, in response to persistent requests on the part of its dealer customers for an expression of its dealer policy, Oklahoma, on February 27, 1935, issued a policy of its own. The evidence shows that Oklahoma's policy was not issued as the result of agreement or understanding with any competitor, dealer or dealer association (Resp. Ex. 3579; Tr. 46539-45).

On April 10, 1935, Oklahoma issued a second announcement of its dealer policy. As in the February instance, the new policy was issued to meet changed competitive conditions brought about by new competitive announcements earlier in the month. Some of the terms of the new competitive policies were more favorable to the dealer trade and Oklahoma had to meet them in order to retain its busi-

ness. The evidence shows that the company's new policy was not issued as the result of understanding or agreement with any competitor, dealer, or dealer association (Resp. Ex. 3581; Tr. 46546-49; 46553-60).

The policy Oklahoma issued in April 1935, differed from those issued by its competitors in April 1935 (Tr. 46550-52; Resp. Ex. 3581).

Oklahoma has always supplied each of its salesmen with a list of the dealers located in the territory in which he works to whom he may sell cement at dealer prices. This list is corrected and kept up to date on the basis of reports sent in daily by each salesman. The company has never exchanged such dealer lists with any of its competitors nor has it ever had any agreement with any competitor or with any dealer association as to whom it would or would not recognize as a dealer (Tr. 46560-64).

10. Exception is taken to the implication that Com. Exs. 2242-47 and Com. Ex. 3305 D refer to meetings involving Oklahoma because they show on their face that they bear no relation to the Oklahoma company. Further exception is taken to the failure to report the evidence showing that no action ever was taken on the proposals referred to in Com. Exs. 2242-47, and that no agreement, understanding or collusion resulted therefrom (Com. Exs. 1125 D-F; 3176 X; 9764 J; see also exceptions to Paragraph 178, *infra*).

11. Exception is taken to the erroneous implication that Com. Exs. 3235-Z82 and Com. Exs. 3235-Z108 refer to meetings involving the respondent Oklahoma (Tr. 46514-15).

Paragraph 54

(Oregon)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Oregon Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by

its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also executions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the unsupported assertion in Paragraph 82 and the footnote to page 9 that Oregon is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is further taken to the failure to report that the Oregon company, in order to save time and at the express invitation of the Trial Examiner (Tr. 38463; 38632; 39018), adopted as its own evidence adduced in behalf of other respondents in lieu of calling a witness. The testimony adopted by the Oregon company was directed at the charges in the complaint, including the subjects reported in Paragraph 54, and expressly met and denied any implication of understanding, agreement or collusion on Oregon's part (Tr. 48102-03).

4. Exception is taken to the failure to report the following evidence regarding Oregon's membership in The Cement Institute:

The Institute has never influenced or attempted to influence Oregon in the matter of its prices or price policies nor has it participated or acted in any way to affect any of the company's competitive policies or practices (Tr. 48102-03; 26136-37; 26208; 26211; 26441-42; 37217; 37607; 37608).

Oregon did not become a member of the Institute until the time of NRA after the Institute's Code of Ethics had been officially cancelled (Resp. Exs. 2173 B-D; 2174 C; Tr. 8469-70; 16699; 16927-29). It has never participated in any of the statistical services of the Institute nor has it ever received or used the Institute's freight rate service which has never covered any of the territory in which Oregon markets its cement (Com. Exs. 595 C, D-E; Tr. 2809; 3154-56; 8467; 16710-11; 16852-53).

5. Exception is taken to the failure to report that Oregon has never operated pursuant to any plan for sharing available business or under any understandings or agreements with anyone to limit or restrict its production or to exchange contracts (Tr. 48102-03; 38691; 40096-98).

6. Exception is taken to the failure to report that Oregon's bid of May 17, 1934 cited in Paragraph 54 was made during the effective period of NRA Code price filing provisions; that the price bid by the Oregon company was the price that had been filed by members of the industry with the NRA Cement Code Authority; and that this filed price included a so-called "control clause" (Com. Exs. 162 B-C; 163-I, N).

Exception is further taken to the failure to report that the land grant rates applicable on this letting were furnished to the bidders by the government and were incorporated in the invitation to bid (Com. Ex. 161 B).

7. Exception is taken to the failure to report the following regarding bids and bidding practices of the Oregon company:

There is no evidence that the Oregon company ever used the so-called "control clause" except on the occasion referred to in Exception No. 6, *supra*. On all of its other bids to public authorities the Oregon company quoted f.o.b. mill prices with no qualifying clauses of any kind. None of these bids were identical with bids of competitors (Com. Exs. 127 A-B; 129; 159[23]; 1328-31; 1381; Resp. Exs. 233 C; 264 H; 369 A-Z; 370 A-K; 384 A-C; 3692; Tr. 10252; 10267-68; 10270-75; 21793-98). Further evidence to this effect was rejected by the Examiner (Resp. Exs. 375-76 for id.; 3660 A, D-Q, S, T, V, Z26 for id.; Tr. 21809-21; 47700-04).

Oregon has never had any agreement with anyone to bid or not to bid prices f.o.b. mill or to quote any particular prices on government lettings (Tr. 48102-03; 26137; 37606; 38733).

The company secures any land grant rate information it may desire from the railroads serving its territory. No one in the Oregon company has ever conferred with any of

its competitors with regard to land grant rates (Tr. 48102-03; 42336).

8. Exception is taken to the citation of Tr. 8616-20 and Com. Exs. 971-9L; 1214 in connection with prices of the Oregon company. None of these citations have any bearing on that subject. Further exception is taken to the failure to report that Oregon has at all times been entirely free to quote any prices it pleases and has never had any understandings or agreements with anyone with regard to the prices it quotes (Tr. 48102-03; 26136-37; 26441-42; 33986; 37605-06; 38703; see also Exception No. 7 and citations *supra*).

9. Exception is taken to the citation of Tr. 8470; 8634-37; and 8786 in connection with "meetings" of the Oregon company because none of these citations have any bearing on that subject.

Exception is further taken to any implication in the statement, "as to meetings" that any practices or policies of the Oregon company at issue have been the subject of any discussion with competitors or meeting attended by a representative of the Oregon company because such implication is contrary to the evidence (Tr. 48102-03; 26196; 26206; 26208; 26211; 33985-86; 37215; 37217; 37607-08; 38691; 38733; 39509-10; 40096-98; 42336; see also Exception No. 8 and citations *supra*). Further exception is taken to the failure to report that there is no evidence that Oregon participated in any meeting or discussion, Institute or otherwise, since 1930.

10. Exception is taken to the failure to cite Tr. 8473-74 in connection with matters referred to in Tr. 8634-37 and cited in Paragraph 54 of the Report.

11. Exception is taken to the failure to report the evidence showing that Oregon has no agreement, arrangement or understanding with anyone with respect to its selection of dealer customers; that The Cement Institute has never had anything to do with Oregon's policy in this regard; and that the company has not had any understanding or agreement with anyone regarding the classes of customers to whom it will sell its cement (Tr. 48102-03; 26136-37; 26208; 37215-17; 37607).

12. Exception is taken to the failure to report the following evidence regarding trucking policies of the Oregon company:

It is the company's practice at its Oswego mill to deliver cement at the mill to the trucks of anyone requesting such delivery. This has been the practice since 1925. The price charged is the company's maximum mill net without any additional charge whatsoever (Com. Exs. 967-2Z; Tr. 8468; 8512; 8513). Requests for deliveries to trucks at the Lime mill have never been extensive. The company has, however, always delivered cement at Lime to the trucks of any dealer customer who desired it. Since 1932 it has been charging customers who take delivery in trucks of the equivalent of a carload or more the price base at the mill. For delivery of less than a carload, it charges 15¢ in addition to the price base (Tr. 8512; Com. Exs. 967-3X, 4L).

The evidence further shows that Oregon has never had any understanding or agreement with anyone with reference to its trucking policies (Tr. 48102-03; 37606-07).

13. Exception is further taken to the failure to report the following evidence relating to Oregon:

Oregon has had no understanding or agreement with anyone regarding its terms and conditions of sale (Tr. 48102-03; 26442; 37607; 37706-07; 39509-10).

The evidence shows that Oregon has had no understanding or agreement with anyone regarding diversions of cement or regarding competition with imported cement (Tr. 48102-03; 26196; 26206; 26211; 26442; 38720; 39509-10).

Paragraph 55

(Pacific)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Pacific Portland Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other

than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Pacific is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the secretary-treasurer and the director of sales of the Pacific company appeared as witnesses on its behalf and that their testimony explained the history and organization of the company and showed that none of its practices or policies were adopted or followed as the result of understanding or agreement with anyone (Tr. 42835-39).

4. Exception is taken to the failure to report the following evidence regarding the history and organization of the Pacific company:

None of the officers or directors of the Pacific company are officers or directors of any other cement company nor is the company affiliated with any other cement company (Tr. 42835).

Pacific markets 78% of its total production in the State of California, the northern and central parts of the State as far south as Bakersfield being its principal market. It also markets cement in the State of Oregon, in western Nevada and, occasionally only, in the State of Washington. Its sales and shipments into these states comprise about 14% of its total sales and shipments. It markets the remaining 8% of its total sales and shipments in Hawaii. The company covers its sales area at the present time by 31 salesmen who are located at points scattered throughout the area (Tr. 42836; 42838).

The company's chief competitors are the mills located in the States of California and Oregon. Competition with the mills of companies other than those in these states is sporadic and negligible (Tr. 42837-38).

5. Exception is taken to the failure to report the following evidence regarding Pacific's membership in the Institute:

Pacific joined the Institute in 1933 in order to participate in the formulation of an NRA Cement Code pursuant to N.I.R.A. The company did not become a member of the Institute until after the Institute's Code of Ethics had been officially cancelled (Resp. Exs. 2173 B-D; 2174 C; Tr. 9134; 9168; 16699; 16927-29).

The company has never participated in or received any of the Institute's statistical services. The Institute has never published any freight rate books for any of the territory in which Pacific markets its cement (Com. Ex. 595 C, D, E; Tr. 2809; 3154-56; 9134; 9168; 16710-11; 16852-53).

6. Exception is taken to the failure to report that Com. Ex. 1212 A, cited in Paragraph 55, was a response to an invitation calling for bids f.o.b. destination only. Exception is taken to the statement that the date of this bid was Dec. 28, 1935 because it is contrary to the evidence (Com. Ex. 1212 A).

7. Exception is taken to the failure to report the following evidence concerning bids of the Pacific company:

Pacific has quoted many prices to governmental agencies on many occasions which were not identical with prices quoted by other bidders (Com. Exs. 112 D; 120 B; 129; 159(23); 984 E; 1093; 1190 C; 1328-31; 1339; 1381; 3213 HH-NN; 3261 S; 3691; Resp. Exs. 233 C; 264 A-H; 295 B-K; 344 A-L; 384 A-C; 3692; 3782; Tr. 263-65; 10038; 10234-36; 10270-71; 21576-77).

Pacific has on many occasions quoted governmental agencies f.o.b. mill prices (Com. Exs. 129; 159(23); 378 V; 984 E; 1099 A; 1328-31; 1339; 1381; Resp. Exs. 233 C; 384 A-C; 3692; Tr. 9171; 10038; 10234-36; 10270-71; 21576-77).

The Trial Examiner rejected further evidence regarding f.o.b. mill and non-identical bids of the Pacific company to agencies of the federal government (Resp. Ex. 376 for

id.; 3660 A, V, Z15, Z16, Z21, Z23 for id.; Tr. 21813-16; 47709-04).

The evidence shows that Pacific has never had any agreement with anyone to make the same bid for any public contract (Tr. 42838-39).

8. Exception is taken to the citation of Tr. 8612-19; 8726-30; 4289 in connection with "pricing" of the Pacific company because they bear no relation to any of the policies or practices, pricing or otherwise, of the Pacific company. Exception is further taken to the failure to report that the evidence shows that Pacific has never had any agreement with any competitor to quote the same price as such competitor for cement at any place or to any customer or to use or employ any particular system or method of pricing (Tr. 42838-39).

9. Exception is taken to the failure to report that Pacific does not sell its product retail and that the dealers to whom it sells must carry a general line of building materials as well as cement (Tr. 42838).

10. Exception is taken to the citation of Tr. 9151 in connection with "meetings" of the Pacific company because it has no bearing on that subject.

11. Exception is taken to the failure to report that Pacific has always made deliveries to customers' trucks at its mill at the mill price base plus cost of containers and discounts (Com. Exs. 968-10Y, 11K).

Paragraph 56

(*Peerless*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Peerless Cement Corporation is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and

none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Peerless is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the erroneous implication that the following references, cited in Paragraph 56, relate to or involve acts or practices of respondent Peerless: Com. Exs. 136-2B; 1128 II and 1857; 970-6G; 23; 45; 1496 A-C; Tr. 34295; 14808-12; 609-13; 11529. The evidence shows, and the Report states correctly that the respondent Peerless came into existence on January 1, 1936. The foregoing exhibits all refer to matters prior to that date.

4. Exception is taken to any implication that the acts or practices of Peerless have been adopted or carried on pursuant to agreement or understanding with any respondent, on the ground that it is not supported by the evidence. Further exception is taken to the failure to report that the vice-president and general manager of Peerless appeared as a witness and testified fully regarding the development and use of the company's practices and policies including the subjects reported in Paragraph 56 (Tr. 34154-548); and that this testimony showed that they were developed and used independently without understanding or agreement with any respondent (See citations below).

5. Exception is taken to the failure to report the following evidence regarding the general organization and operation of Peerless:

Peerless is not affiliated with any cement company by stock or otherwise (Tr. 34423-24). It is a small company, with two mills having a capacity of 3,000,000 barrels. To the extent permitted by the Examiner it was shown that its mills are efficient and modern and are kept up to date. The cost of operating its mills has been constantly reduced (Tr. 3186; Resp. Ex. 2406). The evidence on the subject was largely rejected by the Examiner (Tr. 34420).

Peerless markets cement in Michigan, northern Indiana, and northwestern Ohio. Its average shipments move 32 miles (Tr. 34330-31; 34271; 34426-27).

The company located its principal mill in Detroit in order to be close to the points of cement consumption and to be able to ship most of the raw materials it uses in the manufacture of cement by boat (Tr. 34184).

Peerless' shipments vary from year to year, but they do not vary proportionately to the total volume of shipments in Peerless' market area. The evidence shows that Peerless has had no agreement or understanding to restrict production or share business (Tr. 34220; 34218; 34299; 34310). Peerless has never exchanged orders with competitors in order to save freight (Tr. 34326).

5. Exception is taken to the failure to report the following evidence regarding the prices and price policies of Peerless:

Peerless is generally a price follower (Tr. 34221; 34437) but it has initiated changes in price (Tr. 34221; 34230). Regardless of the method it uses to determine its prices, Peerless has found that in order to sell it must meet the lowest price of any competitor at the point of use (Tr. 34477; 34480). Peerless secures its information about the prices and marketing practices of its competitors from the dealer trade and not from competitors; it does not advise competitors of its prices and it has had no agreement or understanding regarding its prices (Tr. 34335-37; 34339-400; 34246-48; 34390; 34493; 34230).

Peerless' Detroit mill is only four miles from a base mill and its mills are not base mills (Tr. 34344). The company has been free to make its mill a base (Tr. 34344-45).

Peerless has found competitors quoting special prices not only on commercial sales, but also on government bids (Tr. 34357; 34364-65; 34464-66; 34487-88; 34520); Peerless has also quoted special prices (Tr. 34430; 34466-67) and has used its purchases of clay as a raw material as a means of giving concessions in price (Tr. 34185). Price changes occur constantly in the area where Peerless sells (Tr. 34469). The company's regular customers always

give it the opportunity to meet lower prices quoted by competitors (Tr. 34428-29).

The evidence shows that Peerless has made sales f.o.b. mill and that it has had no agreement to refrain from such sales (Tr. 34232; 34236-37; 34273; 34239). Purchasers, however, prefer to have a price quoted delivered at the point where they want to use it (Tr. 34472).

Peerless has sold very little cement to government agencies. It has never bid on any letting where land-grant rates were available to the government (Tr. 34489; 34325; 34231-32; 34241; 34243).

Peerless handles all claims for loss or damage in transit with the carrier (Resp. Exs. 2438 A-B; Tr. 34268). It has always prepaid freight on a large percentage of its shipments (Tr. 34517-18).

6. Exception is taken to the failure to report the following evidence regarding the policies and practices of Peerless as to direct and dealer sales:

Peerless sells over 50 per cent of its cement to dealers (Tr. 34376). It has never published any definition of a dealer. It will sell as a dealer anyone in a community who sells building materials, provided his credit and business standing meet with the company's approval (Tr. 34349-50; Resp. Exs. 2442-48). The requirements vary with the needs of the community (Tr. 34353-54; 34506-07).

Peerless does not require that a dealer be able to purchase cement from another manufacturer before it will sell cement to him (Tr. 34353); nor require him to be a member of a dealer association (Tr. 34355).

The evidence shows that Peerless has not had any agreement with other respondents regarding its selection of dealers (Tr. 34355).

Peerless, in determining whether to sell direct or through a dealer, tries to decide which to do so as to cause no conflict of interest between its customers (Tr. 34377). It has no rigid policy regarding such sales. Its practice is generally similar to competitors' but it is not the same and was not arrived at through agreement (Tr. 34376-77; 34381; 34392).

7. Exception is taken to the failure to report the evidence showing the following with respect to truck delivery by Peerless:

More than 80 per cent of Peerless' total shipments move by truck and in Detroit its truck shipments represent over 90 per cent of its total. The company makes delivery to dealers' trucks at its plant and also ships by contract truckers (Resp. Exs. 2410; 3518; Tr. 34254-55).

Peerless never had a 15¢ loading charge for truck delivery; never took steps with competitors to discourage truck delivery; and never had any agreement with competitors to discontinue truck deliveries (Tr. 34272-73).

8. Exception is taken to the failure to report the evidence showing that Peerless made a survey of the possibility of the use of water transportation facilities, and decided against it because the survey showed delivery could be made cheaper by some other method (Tr. 34175-78; 34183); that Peerless has allowed cement to be shipped from its mills by water (Tr. 34400-01); and that it has had no agreement regarding its method of shipment (Tr. 34183).

9. Exception is taken to the failure to report the evidence showing the following with respect to Peerless' membership in The Cement Institute:

Peerless has not used the Institute freight rate books (Tr. 34430; 34434-36; 34515) or the Compendium (Tr. 34301-02). It has not adopted or used any policy through or by suggestion from the Institute nor has the Institute made any effort to influence its policies (Tr. 34300).

Peerless has found the Institute statistical service of general interest. It never supplied any capacity figures to Mallory (Tr. 34296; 34297-98; 34217-18).

10. Exception is taken to the failure to report that Peerless does not come into competition with imported cement and has taken no action by agreement or otherwise relating thereto (Tr. 34325-26).

11. Exception is taken to the inaccurate and misleading implication raised by the reference in Paragraph 56

to the meeting referred to in Com. Ex. 45, without reporting the evidence of the witness Russell, explaining what transpired and the circumstances under which it occurred (Tr. 34402-03; 34499-500). Exception is further taken to the failure in this connection to report the evidence of the witness Russell regarding his knowledge of the so-called "Cree incident" and the absence of any participation by Peerless (Tr. 34404-05). Further exception is taken to the failure to report regarding Com. Ex. 45 that the meeting referred to therein occurred before the respondent Peerless was in existence.

Paragraph 57

(*Penn-Dixie*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Pennsylvania Dixie Cement Corporation is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Penn Dixie is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 57 that the policies and practices of Penn-Dixie have been adopted or carried on as the result of understanding or agreement with any other respondent. Further exception is taken to the failure to report that the vice president, the general manager and the traffic manager of Penn Dixie testified regarding all of the practices and policies of the company and showed that Penn-Dixie has not adopted

or used any policy or practice through or as the result of understanding or agreement with any respondent (Tr. 8071; 8085; 8131; 8140; 8158-59; 38043-45; 38135; 38136; 38144; 38145; 38146; 38151-52; 38169; 38215; 38219-20; 38240; 38247; 38249-51; 38270; 38377; 38406; 38432; 38439; 38444-46; 38457; 38459; 38469).

4. Exception is taken to the failure to report the following evidence with respect to the Penn-Dixie Company generally:

Penn-Dixie has sales offices in New York City; Boston, Mass.; Rochester, N. Y.; Atlanta, Ga.; Chattanooga, Tenn.; and Des Moines, Iowa (Tr. 38133). The normal shipping areas for its various mills are as follows: Kingsport, Tenn.: southern Virginia and West Virginia, all of North Carolina, northeastern Tennessee, eastern Kentucky, and the extreme northwestern part of South Carolina; Richard City, Tenn.: all of Tennessee except the northeastern part, western and central Kentucky, northern Georgia, all of Mississippi, Louisiana, and Arkansas and all of Alabama except the southeast corner; Clinchfield, Ga.: all of Florida, southeast Alabama, central and southern Georgia, and all of South Carolina except the northwest corner; the Pennsylvania mills: nearly all of New England, all of Delaware, Maryland, and the District of Columbia, eastern Pennsylvania, and northern Virginia and West Virginia; Portland Point, N. Y.: all of New York except the southeastern part, and some shipments to western and Northern Pennsylvania and points in Massachusetts to which its freight rates are lower than from the company's Pennsylvania mills; West Des Moines, Iowa: all of Iowa, southern and central Minnesota, southern and western Wisconsin, western Illinois, northern Missouri, and eastern Kansas and Nebraska with occasional shipments into eastern South Dakota (Tr. 38136-37).

The foregoing areas of shipments are not constant, however. Frequently, Penn-Dixie makes shipments out of one mill that would ordinarily be made from one of its other mills under any one of a number of conditions among which are the following: orders at one plant at a given time in excess of packing and loading facilities at that

plant; shortage of cars, transportation service, or other facilities at the plant; desire to spread temporary high cost at one plant by increasing volume of shipments out of that plant; shut downs at a particular mill for repairs or because of a slack period or strike; change in freight rates from one mill and not from another so that relative advantage of shipment from either may have changed; preference of customer for cement from a particular mill because of color or texture for particular uses; requirement by customer of shipment over a particular railroad that does not serve the mill that would ordinarily ship; requirement by customer for cement tested by a particular testing laboratory, such cement not being available at the mill that would ordinarily ship; requirements by state authorities for cement produced within the state shipped to a point or points within the state normally served by a mill outside the state (Tr. 38137-38).

The extent of the sales territory in which Penn-Dixie competes in the sale of cement is influenced by several factors among which are, first, whether the mill net Penn-Dixie would realize from a particular area is sufficient to warrant canvassing and working the area; second, whether the demand for cement in a particular area is sufficient to justify the sales expense of travelling that area even though mill net might be satisfactory; and third, whether delivery service from a Penn-Dixie mill is sufficiently comparable with that from competing mills to warrant purchasers in desiring Penn-Dixie cement (Tr. 38138-39).

The sales territories served by Penn-Dixie's seven sales offices cover in the aggregate the shipping territories of all Penn-Dixie mills but coincide with individual mill shipping territories only in the case of the Des Moines office which services the territory of the West Des Moines mill. Otherwise, the sales territory of each office is apart from and cuts across the shipping territories of the other seven mills (Tr. 38138).

Penn-Dixie comes into competition with all of the other mills located in the states which are wholly or partly in Penn-Dixie's sales territory plus the mills located in Ohio, Indiana, Texas and Oklahoma (Tr. 38138; Com. Ex. 3113).

Penn-Dixie solicits all of its sales territory almost constantly and at the present time employs a total of 75 salesmen. As demand shifts in the various territories, it is necessary from time to time to withdraw, reduce, or add to the number of salesmen in a particular area. For example, at the present time the company has no salesmen soliciting northwestern Pennsylvania, although this is normally a part of its marketing territory from which it realizes a satisfactory net at its Portland Point mill. Because of the delivery advantage some competitors have over Penn-Dixie to that area, a Penn-Dixie salesman could not sell enough volume to pay his expenses. The same situation obtains in the part of South Dakota to which the West Des Moines mill has made occasional shipments. Because of lack of volume in Maine, the Penn-Dixie salesman who formerly traveled that state exclusively, now devotes one-third of his time to solicitation of the State of Vermont. For some periods, because of low nets to the Richard City mill on shipments to Arkansas and Mississippi, Penn-Dixie accepted business only from old customers in those areas. The same situation exists at the present time with respect to other territories such as Vermont, New Hampshire, Louisiana, Arkansas, and Nebraska (Tr. 38139-40). Penn-Dixie does not withdraw entirely from markets such as these because it cannot afford to. It has poured great sums of money into their development and prefers to keep up its contacts which it would lose were it to withdraw even for a short time (Tr. 38140).

Within the last 15 years, five new mills, namely, the Lawrence mill at Thomaston, Me., the Green Bag of Pennsylvania mill at Neville Island, Pittsburgh, the Nebraska mill at Louisville, Nebraska, the Arkansas mill at Okay Junction, Ark., and the National Portland Cement Company mill at Brodhead, Pa., have been built in areas where Penn-Dixie sells. The establishment of these mills did not so much contract Penn-Dixie's sales territory, but rather resulted in increased sales activity on Penn-Dixie's part. With the increase in sellers, Penn-Dixie in many places sold less cement (Tr. 38140-41).

Penn-Dixie has always shifted its sales effort to conform with the constantly changing demand at the many

points in its sales territory. Building, road, bridge, and other large construction operations require large volumes of cement and such operations fluctuate greatly from year to year and bring about a shifting demand not only as between cities and counties, but as between states and other large areas (Tr. 38141).

All of Penn-Dixie's plants, with the exception of the West Des Moines plant, have been a part of the Penn-Dixie organization since 1926. Penn-Dixie purchased the West Des Moines plant at a foreclosure sale of the physical properties of the Pyramid Portland Cement Co. of Iowa in 1928 (Tr. 38133).

The annual capacity of each of Penn-Dixie's plants is as follows: Kingsport—1,500,000 bbls.; Clinchfield—1;100,000 bbls.; Richard City—2,400,000 bbls.; Nazareth—1,600,000 bbls.; Penn Allen—1,200,000 bbls.; Bath—2,100,000 bbls.; Portland Point—1,100,000 bbls. and West Des Moines—1,200,000 bbls. These capacity figures are based on a survey of independent consulting engineers at the time each plant was acquired. Prior to 1929, changes were made at the Nazareth and Bath plants which increased the original survey figures from 1,300,000 bbls. and 1,940,000 bbls. respectively, to an estimated 1,600,000 bbls. and 2,100,000 bbls. per year. At the Richard City plant, also, prior to 1929, two large kilns were added resulting in an estimated increase of the original survey figure of 2,000,000 barrels per year to an estimated 2,400,000 bbls. (Tr. 38133-34). The foregoing capacity figures represent maximum estimates without allowing for breakdowns, overhauling, limitations on storage capacity, types of orders to be filled and other contingencies (Tr. 38134).

Penn-Dixie manufactures its cement to meet various kinds of tests required by customers. For example, a 10,000 barrel contract may call for a particular bin test. Once tested, the cement is set aside in a sealed bin to be delivered as ordered by the customer, and that particular storage bin is tied up until the contract is filled even though there may be but 500 barrels remaining to be delivered. Most of the storage bins at all plants are tied

up in this fashion at all times. This in turn limits production as cement cannot be manufactured beyond the extent to which it can be shipped upon production or stored (Tr. 38134-35).

Penn-Dixie has never submitted capacity figures of its plants to The Cement Institute nor has it ever submitted those figures to W. S. Mallory, but they have been included in statements to stockholders and advertising literature of the corporation (Tr. 38135).

All of Penn-Dixie's plants, with the exception of Penn Allen, are operating at the present time although all of them have not been operated continuously. Seasonal demand affects all of Penn-Dixie's sales areas with the result that the use of cement in large quantities is confined to 8 or 9 months of the year. For the other 3 or 4 months shipments are light or negligible. This seasonal factor causes the shutting down of its mills when storage bins are filled to capacity. The Penn Allen plant was out of operation from 1930 to 1936, inclusive and has operated since 1937 as a grinding and storage plant in the manufacture of Penn-Dixie high early strength cement, clinker for which is burned at Penn-Dixie's Bath, Pa., mill, which is about one mile from the Penn Allen plant (Tr. 38046-57; 38135; Resp. Exs. 2893-94 for id.).

Penn-Dixie does not operate any silos or warehouses, except that it has a stock interest in a company which operates a silo and warehouse in the District of Columbia and has a subsidiary corporation which operates a warehouse at Miami, Fla. From each of these warehouses Penn-Dixie distributes its cement to customers' trucks (Tr. 38136).

Penn-Dixie is neither a parent nor a subsidiary of any other cement producing company, nor are its officers connected with any other cement producing company (Tr. 38136).

5. Exception is taken to the failure to report the following evidence with respect to Penn-Dixie's membership in The Cement Institute:

Penn-Dixie has been a member of The Cement Institute since the Institute's organization in 1929 (Tr. 38465). It receives statistical reports published by the Institute and

uses them as a supplement to the Bureau of Mines statistics to determine the efficiency of its sales force in securing business as compared with the demand in each area. The Institute statistics are furnished more promptly than those of the Bureau of Mines and Penn-Dixie uses them pending receipt of the Bureau of Mines figures. Penn-Dixie uses Dodge Corporation reports and announcements of future highway construction in planning its future mill operations and does not use either Institute or Bureau of Mines reports for this purpose (Tr. 38466-69). Penn-Dixie has never had any understanding with any of its competitors with regard to use of statistical information furnished by the Institute or by any other statistical agency (Tr. 38469).

Penn-Dixie did not send land grant rate information to the Institute during the operation of the Institute's land grant rate service or during any other period. Penn-Dixie received some notices from the Institute of land grant rate information filed during the operation of the service, but made no use of the information received (Tr. 38503-04).

Penn-Dixie has subscribed to and used Cement Institute rate books for all the territories it serves ever since the Institute rate service was inaugurated. Prior to the inauguration of the Institute rate service, Penn-Dixie always used some form of rate compilation and always bought rate books of independent agencies such as the Nazareth Traffic Bureau and the National Traffic Bureau when such services were available. Penn-Dixie has found the rate books published by the Institute to be more reliable from the standpoint of accuracy than any rate books it formerly used (Tr. 38157-60; 38184-86).

Penn-Dixie requires freight rate information in quickly available and easily useable form in the day to day operation of its business. The Institute rate books contain the lowest freight rates available between Penn-Dixie mills and destinations covered by the books. This information is used by the sales department, the shipping department and the traffic department. The shipping and traffic departments use the rates shown in the Institute books in orders, invoices and bills of lading and also use them as an aid, on the occasions when necessary, in checking the

routing of a particular shipment through the tariffs, and for other similar purposes constantly (Tr. 38192-99; 38477; 8153; 8155; 38182-83). If it were deprived of the Institute rate books, Penn-Dixie would need similar rate compilations of its own, which would necessitate a substantial and permanent increase in the personnel of Penn-Dixie's shipping and traffic departments and consequent increases in the company's cost of operation (Tr. 38188-91; 38210).

Penn-Dixie has at times requested the incorporation in particular Institute rate books of rates from points not previously carried in the particular book. These requests have always been complied with (Tr. 38161; 38168-69).

During the entire period of time that Penn-Dixie has been using Cement Institute freight rate books, it has discovered no more than 10 errors and in such cases has used the correct rate for all purposes (Tr. 38213-15; 38469-75; 38598-99; 8152-53; 48010-11).

6. Exception is taken to the failure to report the following evidence with regard to Penn-Dixie's bidding practices:

It is Penn-Dixie's general policy with regard to all government work, both state and federal, to quote prices equivalent to the commercial market prices at the particular destinations involved. Exceptions to this policy have been Penn-Dixie's prices on T.V.A. work after October, 1934, numerous f.o.b. mill bids to the federal government and, in effect, every price quoted to the federal government where land grant rates are involved. In the latter case, Penn-Dixie quotes in such manner that the federal government takes title to the cement at mill at an f.o.b. mill price and thus secures the benefit of any land grant rate that may apply (Tr. 8080; 38148; 38307-20; 38365-417; 38429-49).

Apart from these exceptions Penn-Dixie does not give special prices on government sales. The company is in a wholesale business and gives all customers the benefit of a wholesale price without discrimination. Government agencies, state and federal over the last ten years, have taken an average of only about 2.5 per cent of Penn-Dixie's total shipments and the company does not believe this warrants

any special discount. Penn-Dixie sales expense on sales to government agencies has always been at least as high as that involved in ordinary commercial sales and in a great many cases, higher. Its manufacturing costs on sales to government agencies have been greater because they usually call for special specifications, require special bin facilities and entail more exacting requirements for laboratory testing, and numerous other factors. Moreover, Penn-Dixie has found that government business, unlike commercial business, is not of a repeat nature that can be depended on for year in and year out shipments (Tr. 38148-49).

Penn-Dixie has submitted bids to state and federal agencies which were not identical with those of other bidders on April 21, 1927 (Resp. Exs. 2350 A-D; P); June 12, 1928 (Com. Exs. 182 A; 183 C); Dec. 17, 1928 (Com. Ex. 772); June 3, 1929 (Com. Ex. 771); Feb. 4, 1931 (Com. Ex. 780); Oct. 10, 1931 (Com. Ex. 2441); June 14, 1932 (Com. Ex. 788); Aug. 25, 1933 (Com. Ex. 789); Sept. 20, 1933 (Com. Ex. 790); and January 24, 1938 (Com. Ex. 1055).

Penn-Dixie's prices on the T.V.A. letting of Oct. 15, 1934 were below its current commercial prices. In arriving at these prices Penn-Dixie acceded to the price formula laid down by Dr. A. E. Morgan, chairman of the T.V.A. Board. Penn-Dixie filed its prices with the Code Authority pursuant to the requirements of the open price filing provisions of the NRA Cement Code and bid the prices it filed. Penn-Dixie at no time considered quoting lower prices and it met the ultimatum only to avoid execution of Morgan's threat to build a new cement plant in the heart of Penn-Dixie's marketing territory.

Penn-Dixie did not collaborate with any competitor in arriving at the prices it filed and bid. To the extent permitted by the Examiner, Penn-Dixie showed that these prices were substantially lower than T.V.A.'s cost would have been had it attempted to supply cement at the dam sites produced at the threatened government mill at Sheffield, Ala. (Com. Exs. 355 A-B; 396-397; 401-402; 925 A6-D6; Resp. Exs. 2201 A-Z71; 2918 A-Z20; 2919 A-D; 2920 A-C; 2921 A-C; Tr. 38307-417; 38428-29; 38533-34; See also exceptions to Paragraphs 189-190, *infra*). Other evidence con-

firming this was rejected by the Examiner (Resp. Exs. 2916 for id.; 2922 A-Z3 for id.).

Prior to March 30, 1938, no department of the federal government ever requested bids f.o.b. mill from Penn-Dixie except where land grant rates were involved. It has always been Penn-Dixie's practice in response to such invitations to sell the government at f.o.b. mill prices so that it could secure the benefit of any available land grant or special rate (Tr. 38433-35; 38438-42).

Penn-Dixie quoted numerous f.o.b. mill prices to the federal government without any "control clause" or other qualifying clause during the period from 1928 through the early part of 1934 (Resp. Exs. 2350 A-D; P; Com. Exs. 182 A; 183 C; 772; 771; 773; 185 A; 186 F; 776; 779; 781; 784; 788; 187 A; 188 C; 789; 790; 396-97; Tr. 38308-11; 38314-20; Com. Ex. 792 A-B). Evidence of other such bids was rejected by the Trial Examiner (Resp. Exs. 2914 A-Z; 2915 A-Z4).

Beginning in May, 1934 during the NRA Code period, Penn-Dixie began to quote the federal government a destination cost in conjunction with the "control clause", whereby the government, by deducting the applicable land grant or special rate, could determine the f.o.b. mill price for invoicing and shipping purposes. Penn-Dixie learned of the "control clause" after one of its competitors had filed it with the Code Authority as part of its price for use on a government letting. Penn-Dixie used the "control clause" during the NRA and from time to time since, although more recently it has again bid f.o.b. mill without the "control clause." Penn-Dixie has never had any understanding or agreement with any of its competitors with regard to this method of bidding (Tr. 8150; 38441-44; Com. Exs. 165; 166-67; 171; 314-Q; 169; 1088; 1086; 1092; 338; 1083; 1084; 1094; 334; 339; 337; 336; 1091; 335; 180; 181-K; 156; 363-C; 1055; Resp. Exs. 3168; 803-04).

Penn-Dixie did not bid in response to the Procurement Division invitation of March, 1938 (Com. 1339) or to one or two subsequent invitations of this agency, because these invitations were indefinite as to quantities of cement called for and as to time and place of delivery. Penn-Dixie had

no discussions with any of its competitors with regard to its action in response to these invitations (Tr. 38429-33; 38434).

Penn Dixie has always secured the land grant rate information it uses in connection with bids to the federal government from official tabulations of prior bids and from railroads. On a few occasions Penn Dixie has itself figured the land grant rates it uses. It has never exchanged land grant rate information with any of its competitors (Tr. 38435-39; 38503-06; 38508-09).

Penn Dixie has handled the fractions of a cent in bids where land grant rates are involved in different ways. It adopted its present practice of dropping all fractions of a cent to meet a competitive condition initiated by the Signal Mountain Company several years ago on a War Department letting at Fort Oglethorpe, Georgia. When bids were opened, the government tabulation showed that Signal Mountain had dropped fractions of a cent in its price, was low bidder, and had been awarded the business. On subsequent bids, in order to meet this competition, Penn Dixie adopted that practice (Tr. 38444-49; 38524-25). Other evidence in explanation of this practice was excluded by the Examiner (Resp. Exs. 2924 A-i for id.).

7. Exception is taken to the failure to report the following evidence with regard to the pricing policies of Penn Dixie:

In order to meet competition, Penn Dixie's prices must be at least as low as the lowest at the point of use because customers compare the costs of competing brands at destination. Accordingly Penn Dixie quotes and sells at delivered prices except for certain sales to the federal government and to railroads (Tr. 8122; 38141-42; 38147-48; 38600-01). Penn Dixie cement is sold on a delivered basis and the company agrees to deliver the cement to its customers in good condition. If part of a shipment is lost or damaged in transit and the customer so advises Penn Dixie, Penn Dixie credits the customer for the damaged or lost cement and in turn presses the claim against the railroad (Tr. 38205-07).

Penn Dixie charges all customers of the same class at the same place the same price at a given time (Tr. 8159-60; 38142). Penn Dixie promptly sends printed quotations to all dealer and prospective dealer customers whenever it changes its prices (Tr. 8151-52; 8159-60; 38143). The company has quoted lower than its published prices from time to time in all parts of its marketing territory, however, in an attempt to meet lower secret prices of competitors (Tr. 38479-83).

Penn Dixie maintains files of delivered price cards for each of its dealer accounts. When the price to a particular dealer customer is changed and a written quotation sent out, the new price and the date of its quotation is immediately entered on that dealer customer's card. The cards are used in day to day quotation of prices (Tr. 38264-65; 38267-70; Resp. Exs. 2909 D-O).

In some marketing areas Penn Dixie has found it advantageous to have a so-called price base at its mill. In such cases it quotes prices which are the equivalent of its price base and freight to destination. However, at all points where such a price is not lower or as low as any competitor's price, Penn Dixie meets the lowest competitor's price it finds at such points if it is interested in soliciting the prospective business at these points. Penn Dixie has had and now has price bases at its Clinchfield, Kingsport and Richard City mills and, with the exception of a small area around the mills, from its three Pennsylvania mills. It also in the past had a price base at its Portland Point mill. The status of each Penn Dixie mill and its price base is determined solely by the company, but depends upon the competitive conditions existing in each mill's selling territory and upon costs and other conditions peculiar to that mill (Tr. 8158; 38058-59; 38076-78; 38126-27; 38142-43; 38291-99). Resp. Ex. 2895 for id., bearing further on this, was rejected by the Examiner.

When Penn Dixie finds new prices being quoted by some competitor at various points in the field, it endeavors to ascertain by deduction of freight whether or not the new prices reflect a price base or change in price base at some mill. If it appears that they do Penn Dixie, if it meets

the changes, uses such base in quoting destination prices. If the new delivered prices are higher than the prices Penn Dixie has been quoting, it has the choice of continuing its existing prices or raising them, but if the new prices are lower than Penn Dixie's prices, it has no such choice but must at least meet them (Tr. 8158; 38143-44).

Penn Dixie has never had any assurance that its delivered prices will be as low as the lowest prices at the points involved. The evidence shows that it never has had an agreement or understanding with any other company that it or they would use basing points to ascertain or quote prices, or that any particular mill will or will not be a so-called price base mill, or continue its status as a base or non-base mill (Tr. 38144; 38219-20).

Market prices Penn Dixie meets in the field do not always reflect a price base at some mill. Between 1932 and 1938, of the total shipments made by Penn Dixie, 20% to 60% of such annual shipments were made at prices which did not reflect any base (Tr. 38144-45).

Penn Dixie supplies to members of its own organization lists of price bases which appear to be reflected in delivered prices quoted in its sales territory. When price changes occur and Penn Dixie meets them, it corrects its lists of price bases in pencil for the office record. If the new prices are met by all competitors and appear to be effective, Penn Dixie mimeographs its corrected list of bases and distributes it within its organization. Penn Dixie has received and granted an occasional request from some competitor for a copy of its current list of bases. It has never received a list of price bases from any competitor (Tr. 8085; 38145; 38218-19).

Penn Dixie obtains its information as to competitors' prices from daily reports by its salesmen and from dealer customers, many of whom inform Penn Dixie of any prices lower than Penn Dixie's price and often of any higher price being quoted. Another source of information as to prices quoted by competitors is tabulations of bids submitted to government agencies, state and federal, and occasionally commodity prices published in newspapers and trade journals. Other than these sources, Penn Dixie has no other

source of information as to competitors' prices (Tr. 38145-46; 38218-20; 38303-07). Documentary records of the company offered to confirm the testimony to this effect was rejected by the Examiner (Resp. Exs. 2906 A-Z206 for id.; 2913 A-K for id.).

Penn Dixie learns of changes in competitive prices or policies from its salesmen and dealers almost immediately after competitive announcements are received by dealers. Sometimes as many as forty or fifty dealers have telephoned the information in when changes occur; sometimes many more (Tr. 38146-47).

8. Exception is taken to the failure to report the following evidence with regard to trucking policies of the Penn Dixie Company:

Prior to 1932 a small percentage of Penn Dixie's total shipments from several of its plants was in the form of deliveries to customers' trucks (Tr. 38149). The company found that such deliveries were fraught with all the inconvenience and difficulty to be expected when plants designed and equipped for wholesale operations in carload units, are required to sell in small, spasmodic retail lots. For example (Tr. 38149-50): the loading facilities of the Penn Dixie plants were not designed to accommodate trucks. It was difficult and impracticable to bring trucks close to the packing machines because of intervening railroad tracks where carloading was often going on. The result was disruption of normal carloading operations and increased loading cost. Trucks came at irregular hours, day or night, and disorganized trucking and loading schedules. Loading crews had to be available at all times with consequent increase in cost to Penn Dixie. Amounts of cement called for were invariably small and multiplied invoicing and bookkeeping greatly in excess of that necessary in normal wholesale business. The company had no facilities at its plants for handling payments or checking the credit status of people calling at the plants with trucks.

Equally important to Penn Dixie was the fact that trucking was carried on to a large extent by truckers who were not regularly engaged in the sale of cement or other build-

ing materials. Responsible and established dealer customers complained to Penn Dixie that these trucks were underselling them in their own towns. Penn Dixie was thus taxed to retain the good will of many of its best and most substantial customers (Tr. 38149-50).

Under these circumstances when Penn Dixie discovered from announcements of competitors in the northeast that they were charging a 15-cent differential for loading customers' trucks, Penn Dixie was glad to and did adopt a similar charge at its Pennsylvania mills and its Portland Point mill. A year or so later Penn Dixie extended the 15-cent loading charge to its Richard City and Clinchfield mills. It never instituted this charge at Kingsport or at West Des Moines (Tr. 38150-51).

Subsequently, in April 1932, Penn Dixie discontinued deliveries to customers' trucks at its West Des Moines mill and in July 1932 at its Richard City, Kingsport and Clinchfield mills. At these places Penn Dixie's action was not preceded by discontinuance at any competitor's mill. With respect to its Pennsylvania and Portland Point mills, Penn Dixie discontinued delivery to customers' trucks after it learned from the field that competitors had done so (Tr. 38151).

The evidence shows that none of Penn Dixie's policies or practices with respect to deliveries to customers' trucks have been the result of agreement or understanding with any of its competitors or with any dealers, dealer associations or railroads (Tr. 38151-52; 38449-64).

Testimony showing the resumption of truck deliveries by Penn Dixie at Portland Point to meet the competition of other respondents in that area and the circumstances accompanying it was received (Tr. 38152) but later stricken by the Examiner (Tr. 38218).

Testimony showing that truck rates in many cases are higher than rail rates was also stricken by the Examiner (Tr. 38152-53; 38218).

Testimony showing that truckloading at Penn Dixie's Portland Point plant is more costly than carloading, was also stricken by the Examiner (Tr. 38153-54; 38218).

Paragraph 58

(*Petoskey*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Petoskey Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Petoskey is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the vice president in charge of sales and traffic of Petoskey appeared as a witness and testified fully regarding the origin and development of the company's practices which are at issue; and that this testimony showed that none of the company's practices have been adopted or carried on pursuant to agreement or understanding with any respondent (Tr. 38686-843).

4. Exception is taken to the implication that Petoskey attended the meeting referred to in Com. Ex. 1965. The evidence shows the contrary and further that Petoskey was not involved in the subject matter (Resp. Ex. 3265; Tr. 38730).

5. Exception is taken to the implication that Petoskey did not permit trucking because the evidence shows otherwise (see *infra*).

6. Exception is taken to the implication that Lucas of Petoskey attended the meeting referred to in Com. Ex. 20, and to the failure to report the testimony of Lucas that he was not present (Tr. 38776).

7. Exception is taken to the failure to report that the meetings referred to in Tr. 11529-33, Com. Exs. 1496 A-C, and Com. Ex. 20 were meetings held in connection with the preparation of the NRA Cement Code (Tr. 38826; 38782; 982).

8. Exception is taken to the failure to report that the evidence shows the following regarding Petoskey's organization and location:

Petoskey is not affiliated with any other cement manufacturing company (Tr. 38736; 38738). It is a small company with one mill having a capacity of 1,500,000 barrels (Tr. 38737). The mill is modern, efficient and kept up-to-date. It is located at the site of good raw materials (Tr. 38737-38; 38698-99). The territory near the mill is a sparsely settled area which consumes very little cement. (Tr. 38697-98).

Petoskey has silos or bulk plants located at points on the Great Lakes which it uses as distributing points after water shipments from its mill (Resp. Ex. 3224; Tr. 38738-39). It originally shipped cement in packages by boat to warehouses, but it found this very expensive, and insfalled the bulk plants instead (Tr. 38738-39; 38698-99).

Petoskey markets its cement in Michigan, Wisconsin, southeastern Minnesota and northern Illinois (Tr. 38739).

The company has not had any agreement to divide business (Tr. 38687) or to restrict production or shipments in 1930 or at any other time (Tr. 38691). In 1930 Petoskey produced 84.4% and shipped 78.5% of its mill's capacity (Resp. Ex. 2934).

9. Exception is taken to the failure to report the evidence showing the following with respect to Petoskey's pricing:

Petoskey has had very few requests by dealers or contractors for prices f.o.b. mill, and only a few such requests from the government. Customers invariably request prices f.o.b. destination, and Petoskey therefore sells largely at delivered prices (Tr. 38748-49; 38701; 38802-03).

Petoskey, however, has no policy against making sales f.o.b. mill. It has made such sales in the past and would

continue to do so when requested (Tr. 38749; 38699-700; 38764). The company has had an f.o.b. mill price at its plant since 1922. This price has no relation to any basing point (Tr. 38799).

Petoskey is usually a price follower, generally meeting the lowest price it has found in any market regardless of whether or not the price did reflect a base (Tr. 38747-48). Petoskey is free to become a price leader or to make its mill a base mill (Tr. 38748; 38702-03). Petoskey has never been a base because it is located in an area in northern Michigan where any base would be ineffective in any important market unless it were set at a very unprofitable level. Under these conditions Petoskey has thought that a base was not advisable (Tr. 38748; 38697-98). The company has had no agreement concerning its mill's being a base or non-base mill, or concerning the base or non-base status of any competitor's mill (Tr. 38840).

Petoskey secures its information concerning the published and unpublished prices of its competitors by means of information gathered by its salesmen in the regular course of their calling on the consumer trade (Tr. 38742-45). It has found that buyers are well informed as to prices (Tr. 38743) and that this method is a prompt means of securing accurate price information (Tr. 38743-44; 38752). Petoskey does not exchange price information with competitors (Tr. 38703).

Petoskey cannot sell its cement for more money or with less favorable terms than competitors and must at least meet the lowest price in any market (Tr. 38744; 38751; 38756). Competitors' prices in Petoskey's market area sometimes have been flat prices for a state or several counties; at other times they have reflected a base plus freight; and some prices are apparently not related to either zones or bases (Tr. 38746-47; 38793-94).

In the event of a price change Petoskey learns from the purchasing trade what has been done in all of the important cement consuming markets (Tr. 38745; 38749).

Petoskey has found that its competitors sell at secret or special prices. Petoskey has also done so (Tr. 38752-54). Petoskey does not ordinarily find the prices of various

competitors the same. Petoskey then attempts to meet the lowest price, but at times has quoted prices different from those of any competitor (Tr. 38832).

On several occasions a competitor announced increases in price which Petoskey did not follow (Tr. 38701).

Petoskey has found that, with prices as they have been in its area, a reduction does not result in an increase in sales (Tr. 38751).

There has been no agreement regarding price leadership in Michigan (Tr. 38702); nor as to the price level in Milwaukee (Tr. 38782).

Petoskey considers its prices to be its delivered prices and not its mill nets (Tr. 38705-06). Petoskey makes up and uses totals of delivered prices (Tr. 38829). Its forms state that when the buyer pays transportation charges he pays them for the account of the seller and the company handles claims for loss or damage (Resp. Exs. 2938 B; 2939 B).

10. Exception is taken to the failure to report the evidence showing the following regarding the dealer practices and policies of Petoskey:

The dealer is Petoskey's most important customer, taking from 80 to 85 per cent of all its shipments (Tr. 38754). A very large proportion of its sales is made to small dealer accounts in small towns (Tr. 38740). The importance of the dealer has had a large influence on Petoskey's sales and marketing practices (Tr. 38754) and it respects the views of its dealer and contractor customers because it has to rely on their regular business (Tr. 38750; 38719).

Petoskey has had the same concept of a dealer since its organization, but varies it with the size and need of the market. The company, however, never published a definition of a dealer (Tr. 38755; 38718). Petoskey investigates a prospective dealer, and if he can fill the needs of his community in supplying cement, Petoskey will sell cement to him (Tr. 38754-55). Petoskey sells to some dealers not sold by competitors, and some competitors sell to persons Petoskey would not sell to as a dealer (Tr. 38719).

Petoskey has had no agreement with competitors or dealer associations as to who should be considered dealers (Tr. 38719); it has never refused to sell cement to any

dealer because he was not a member of some dealer association (Tr. 38719). Petoskey has sold cement to the McCall Lumber Company (Tr. 38779).

Petoskey sells through dealers where they perform a service; otherwise it sells direct to the consumer (Tr. 38755). The company has published an announced policy to the trade on only one occasion and this was in response to a demand from its dealers to know the company's policy after Article XI of the NRA Code was suspended (Tr. 38714; 38718). Petoskey has varied from the provisions of this announced policy. It has had no agreement or understanding with competitors regarding its direct or dealer sales policies (Tr. 38718-19; 38777; 38755-56).

11. Exception is taken to the failure to report the following evidence showing the practices of Petoskey regarding bids:

Petoskey never refused to quote or sell on an f.o.b. mill basis to the United States Government (Tr. 38801; 38837-38; Resp. Ex. 2948). It has a policy of selling the Government f.o.b. mill when requested, and has submitted f.o.b. mill bids (Tr. 38809; 38837-38; 38732; 38764; Resp. Ex. 2948).

Government agencies usually request delivered prices, and in such cases Petoskey usually quotes its regular commercial price at the particular destination (Tr. 38750). It has at times bid lower and has bid at prices which were not identical with those of competitors (Tr. 38750; Com. Ex. 1910).

Petoskey had no agreement as to the manner of its reply to Com. Ex. 1339 (Tr. 38733; Resp. Ex. 2948).

Petoskey obtains applicable land grant rates from the railroad on which its mill is located (Tr. 38764).

12. Exception is taken to the failure to report the evidence showing that Petoskey has had no agreement with competitors to prevent diversions by use of a bill of lading stamp or otherwise and has never discussed the question of diversions with competitors (Tr. 38720; 38817; 38815-16).

13. Exception is taken to the failure to report the following evidence regarding truck delivery by Petoskey:

Petoskey has allowed dealers to come and truck from its mill ever since the mill was built (Tr. 38728; 38720-21). It has also had the same practice at its silos (Tr. 38722; 38787-88). In addition, it delivers cement by contract truck (Tr. 38721; 38724; Resp. Ex. 2946).

Since January 1922, Petoskey has had an f.o.b. mill price for truck delivery (Tr. 38787; Resp. Ex. 2949-C; Tr. 38722). This f.o.b. mill truck price has no relation to the destination of the cement (Tr. 38822).

Petofsky has not had a 15-cent charge for loading customers' trucks (Tr. 38727); it never had any agreement to make such a charge (Tr. 38726-27); and never discussed this with railroads (Tr. 38731).

Petoskey has found that trucking in the Upper Peninsula is uneconomic due to the ferrying charges (Tr. 38729-30). It has not had any agreement not to truck to the Upper Peninsula (Tr. 38729).

Petoskey did not participate in meetings at which the effect of trucking upon delivered prices was discussed (Tr. 38826); or at which it was decided that trucking would be discontinued (Tr. 38826). Lucas of Petoskey never attended a meeting where trucking was discussed and at which F. R. Johnson was present (Tr. 38826). He testified that he attended a meeting during the formation of the NRA Code where there was some discussion of how trucking practices should be filed (Tr. 38826; 38782).

14. Exception is taken to the failure to report that Petoskey does not come into competition with imported cement and has not had any agreement concerning imported cement (Tr. 38766).

15. Exception is taken to the failure to report the following evidence regarding Petoskey's membership in The Cement Institute:

Petoskey receives statistical reports of the Institute and uses them merely as a means of keeping posted on matters of general information (Tr. 38756-57).

The company had no agreement to file prices with the Trade Practice Committee of the Institute (Tr. 38731); nor to abide by prices filed with the Trade Practice Com-

mittee (Tr. 38705). The filing of prices with the Trade Practice Committee was entirely voluntary (Tr. 38830-31).

Petoskey uses Institute rate books because they are a cheap and convenient method of securing rate information. They are used in invoicing and billing shipments from Petoskey's mill (Tr. 38757-58). Petoskey has found it is not necessary to put in the route in order to protect itself on the lowest rate (Tr. 38710).

Petoskey prepares its own tables to convert the official rates expressed in cents per 100 pounds into cents per barrel (380 pounds in sacks). It has had no agreement as to how the rates are to be converted (Tr. 38710) nor as to the use of the Institute rate book (Tr. 38709).

16. Exception is taken to the failure to report the following regarding "meetings" in Paragraph 58:

H. H. Lucas of Petoskey testified that he never met Stroh of Wabash or was in his office (Tr. 38776).

Petoskey had no part in the discharge of Cree (Tr. 38777).

Lucas of Petoskey was present at the meeting referred to in Com. Ex. 45, but did not discuss, or agree on, Johnson's (of Aetna) policy; and no agreement was reached by anyone (Tr. 38781-82).

Petoskey had no connection with Com. Ex. 42 (Tr. 38780).

Exception is also taken to the citation of Tr. 583, on the ground that it does not deal with Petoskey, and of Tr. 38787, on the ground it does not deal with the subject matter for which it is cited in the Report.

Paragraph 59

(Pittsburgh Plate Glass)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Pittsburgh Plate Glass Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited. (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Pittsburgh is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 59 that any of the acts or practices of Pittsburgh have been adopted or carried on pursuant to agreement or understanding with any other respondent; and the failure to report that the sales manager of the company appeared as a witness and testified fully regarding the development and use of the practices and policies of Pittsburgh, including the subjects reported in Paragraph 59 (Tr. 37674-38040); and that this testimony showed that they were developed and used independently, without understanding or agreement with any respondent (see specifically below).

4. Exception is taken to the failure to report the following evidence regarding the organization and operation of Pittsburgh, generally:

Pittsburgh Plate Glass went into the cement business in 1924 (Tr. 37682). The company is not affiliated with any cement producer by stock or otherwise (Tr. 37684). It owns one small mill, having a capacity of 1,875,000 barrels. To the extent permitted by the Examiner it was

shown that the mill was located to take advantage of cheap raw materials and that the mill is modern and up to date. Some of respondent's proof was stricken on this subject (Tr. 37682-84; 37762-63).

Pittsburgh markets cement in Ohio, western Pennsylvania, West Virginia, northern Kentucky and eastern Indiana (Tr. 37684-86).

The evidence shows that the company had no understanding or agreement in 1930 to curtail production to 70% capacity (Tr. 37728); in fact, in 1930 Pittsburgh operated at 86.3% of capacity (Com. Exs. 2895 A-D). It shows further that Pittsburgh has never had any agreement to restrict the amount of cement it would produce or to allocate shipments or business with competitors, but has always tried to get every barrel of business it could (Tr. 37771).

5. Exception is taken to the failure to report the following evidence regarding pricing by Pittsburgh:

Pittsburgh has found that purchasers are interested in and request the price at the point of use. Accordingly, the company usually quotes delivered prices (Tr. 37693; 37700).

It has no policy against selling f.o.b. mill however and has made some quotations on that basis when requested (Tr. 37701; 37927). The evidence showed that if Pittsburgh were restricted to exclusive use of inflexible mill prices the result would be disastrous to it (Resp. Exs. 2881; 2882).

Pittsburgh is usually a price follower, meeting the lowest price it finds in the market regardless of whether or not the price appears to reflect a base (Tr. 37693-94). At times, it has quoted prices which were not the same as the lowest price quoted by a competitor (Tr. 37693). The company secures its information as to competitors' prices from the dealer and consumer trade and not from competitors (Tr. 37688-90; 37815; Resp. Ex. 2864). It finds that its regular customers ordinarily give it an opportunity to meet any lower prices quoted by competitors (Tr. 37690).

Whenever there is a price change Pittsburgh learns of it promptly from the trade and immediately checks quotations at many destinations, including those at all important markets to ascertain from this price information what the change amounts to, or whether it reflects some pattern (Tr. 37691-92).

Pittsburgh's mill is not a base mill, but the company has always been free to make its mill a base if it should decide to do so. The evidence shows the sound business reasons which have caused Pittsburgh not to make its mill a base (Tr. 37694; 37816-17; 37822-25; 37828-30; Resp. Exs. 2867 A-D).

The evidence further shows that the company has had no agreement or understanding regarding its prices; or that it should or should not exercise price leadership; or regarding which mills have been base or non-base mills; or as to the base figure at any mill (Tr. 37730; 37779; 37815-16).

Pittsburgh finds competitors have sold at prices below their published prices. Pittsburgh has also done so (Tr. 37704-07; 37915; 37917; 11339-41). On large orders special prices are frequently available (Tr. 37706).

There have been occasions when attempted price increases have not become effective (Tr. 37696-97; 37787). Pittsburgh has not discussed price increases with competitors and has not had any agreement regarding increases which have occurred (Tr. 37795; 37804; 37797-805; Resp. Ex. 2864 A).

Customers pay the transportation charges to the carrier for Pittsburgh's account and the company takes care of damage or loss in transit (Tr. 37846).

6. Exception is taken to the failure to report the following evidence regarding bidding by Pittsburgh:

Pittsburgh usually bids its commercial price to federal and state government bodies. On a few occasions it has bid lower (Tr. 37702; 37917).

Pittsburgh does not sell cement in territories where there are land grant rates (Tr. 37887). The company has made f.o.b. mill bids and has not had any agreement to refrain from such bids (Tr. 37902-03; Com. Ex. 1864).

Pittsburgh bid $2.02 to the U. S. Industrial Reformatory, Chillicothe, Ohio, in April and May, 1936, and received the award (Resp. Exs. 2885 A-F). It therefore bid $2.02 on the June 12, 1936 inquiry (Resp. Exs. 2885 G-I; Com. Ex. 373 A).

7. Exception is taken to the failure to report that the evidence shows the following regarding direct and dealer sales by Pittsburgh:

The dealer is Pittsburgh's most important customer. About 65% of its sales are to dealers. This importance of dealers has had a profound effect on Pittsburgh's marketing and pricing policies (Tr. 37707).

The company has had a concept of a dealer ever since it began operating. The application of this concept, however, varies depending upon whether it has adequate dealer representation in the market and upon the size and needs of the market.

Pittsburgh investigates the qualifications of dealers but it has never published any definition of a dealer, and has never been influenced by the fact that other manufacturers may not regard a given customer as a dealer, or that he is or is not a member of a dealer association (Tr. 37708-09; 37935; Resp. Ex. 1766; Com. Ex. 1934).

Pittsburgh sells through dealers only where dealer service to the consumer is required and when a sale through the dealer seems fair and logical (Tr. 37708).

Article XI of the NRA Cement Code substantially expressed the policy Pittsburgh had been pursuing prior to that time and when it was suspended Pittsburgh continued to follow the same policy in a general way (Tr. 37708).

The company published announcements of the kind of work it would sell direct and through dealers in February and April, 1935, after it picked up similar announcements by competitors in the field. The evidence shows that these announcements were not made pursuant to agreement with any competitor, nor have any of the company's marketing policies been the subject of any such agreement (Tr. 37940-41; 37708; 37944; 37730). Pittsburgh has not adhered strictly to these announced policies and among other

things has bid direct on federal emergency relief projects (Tr. 37941-43; Resp. Ex. 2317).

8. Exception is taken to the failure to report the following shown by the evidence with respect to truck delivery by Pittsburgh:

At one time the company made delivery to customers' trucks at its mill but the demand for such delivery was small and it was expensive and a nuisance to load trucks. The mill was unfavorably located for truck transportation and many of the company's dealers complained of the practice (Tr. 37846; 37848-50; 37851-52; 37854). As a result Pittsburgh discontinued delivery to trucks at its mill and has permitted it since only in case of an emergency. This action was taken by the company independently without any understanding or agreement with competitors (Tr. 37848-49; 37862-63; 37867-68; 37881).

Pittsburgh maintains a warehouse at Bowling Green, Ohio, where it still makes truck delivery. The company had at one time a warehouse at Pittsburgh but found this too expensive and discontinued it (Tr. 37851-53; 37859).

The company never had a 15 cents charge for loading trucks (Tr. 27855).

9. Exception is taken to the failure to report the following shown by the evidence with respect to Pittsburgh's membership in The Cement Institute:

The company joined The Cement Institute in June, 1933, in order to participate in the drafting of a NRA Code for the cement industry. The company had not received any Institute services prior to that time (Tr. 37721; Resp. Ex. 2840).

The company has not considered the Institute to be a formulator or arbiter of marketing policies and the company's prices and marketing practices have never been interfered with or influenced by the Institute (Tr. 37741; 37730).

Pittsburgh has a traffic department which prepares its own freight rate books from the official tariffs. These rate books contain rates from many mills, including those which have not been basing points. The company's sales-

men are not supplied with copies of Institute rate books (Tr. 37742-43; 37752-53; Resp. Ex. 2858; Tr. 37709).

The company uses the statistics disseminated by the Institute merely in order to keep posted on matters of general information in the area where it sells (Tr. 37710) and during the period that the Institute had a contract reporting service Pittsburgh found this of value in reducing sales costs (Tr. 37980; Resp. Exs. 2841 A, B; 2843).

10. Exception is taken to the failure to report the evidence showing that the terms and conditions of sale of Pittsburgh have been developed in response to the competitive necessity of offering terms and conditions as favorable as those of any other competitor and that they have not been adopted or used pursuant to any agreement or understanding with any respondent (Tr. 37709; 37844).

11. Exception is taken to the failure to report that Pittsburgh Plate Glass ships cement by barge on the Ohio River and tributaries (Tr. 37883).

12. Exception is taken to the failure to report that Pittsburgh Plate Glass has not come into competition with imported cement and has had no agreement or understanding with respect to foreign cement (Tr. 37753-54).

Com. Ex. 3155 A; Resp. Exs. 1755 and 1756 cited in Paragraph 59, do not relate to the Pittsburgh Plate Glass Company.

Paragraph 60

(Utah)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Portland Cement Company of Utah is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that the Utah company is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that, in order to save time and at the express invitation of the Trial Examiner (Tr. 38463; 38632; 39018), the Utah company adopted as its own, evidence adduced in behalf of other respondents in lieu of calling a witness. The testimony adopted by the company was directed at the charges in the complaint, including the subjects reported on in Paragraph 60, and expressly met and denied any implication of understanding, agreement or collusion on the part of Utah (Tr. 48105).

4. Exception is taken to the failure to report the following evidence concerning the Utah company generally:

The company is a small family corporation: none of its officers or directors are officers or directors of any other cement company nor is it affiliated with any other cement company. Its mill at Salt Lake City has an annual capacity of about 250,000 barrels and owing to the severity of weather conditions in the vicinity and to the small demand in the area it serves, has never operated for more than 4 or 5 months a year (Com. Exs. 3137 B-D).

The company has never operated pursuant to any plan for sharing available business nor has it ever had any agreement with competitors to restrict the production of its mill or to exchange contracts (Tr. 48105; 38691; 40096-97; 40098).

5. Exception is taken to the failure to report the following evidence regarding Utah's membership in The Cement Institute:

The Institute has never had anything to do with any of the company's policies or practices (Tr. 48105; 26136-37; 26442; 37217).

Utah was at no time a member of the Institute prior to the official cancellation of the Institute Code of Ethics or at any time prior to December, 1936 (Resp. Exs. 127 C;

2173 B-C; 2174 C; Tr. 16699; 16927-29). The company has never participated in any of the Institute services, statistical or otherwise. It has never received or used the rate books published by the Institute and has never had any understanding with regard to rate books or any other freight rate compilations (Com. Exs. 595 C, D-E; Tr. 2809; 3154-56; 16710-11; 16852-53; see also Exception No. 6 to Paragraph 1, *supra*).

6. Exception is taken to the misleading statement in Paragraph 60 that Portland Cement Company of Utah was "involved in identical bidding" because it erroneously implies that the company has submitted sealed bids to federal or state governmental authorities which were identical with bids of competitors. Com. Ex. 2703, referred to in support of the statement, comprises invoices of the Utah company on cement in all instances sold to dealers on the open market at commercial prices f.o.b. mill or f.o.b. destination.

7. Exception is further taken to the failure to report that there is no evidence that the Utah company has ever submitted a bid on federal or state government work that was identical with that of any other bidder. The evidence shows that on all invitations of governmental agencies in response to which the Utah company bid, it bid only f.o.b. mill prices and the prices were not identical with any of the prices quoted by other bidders (Resp. Exs. 384 A-C; 3692; Tr. 10263; 10269-70; 10273-74). The Trial Examiner rejected further evidence of f.o.b. mill and non-identical bids by the Utah company (Resp. Exs. 3660 B, D for id.; Tr. 47700-04).

The evidence is that the Utah company has never had any agreement with anyone regarding any of its bids or bidding practices (Tr. 48105; 37606; 38733).

8. Exception is taken to the failure to report that the "meeting" referred to in Com. Ex. 3235-Z82 (cited in Paragraph 60), was a meeting of the A.A.P.C.M. held in 1911. Exception is also taken to the failure to report that there was no discussion of prices or marketing

practices at this meeting (Tr. 48105; 33986). Further exception is taken to the failure to report that there is no evidence that the Utah company has been represented at any meeting since the one referred to in the Report other than a general meeting of the cement industry held during the NRA Code period to which it was invited pursuant to provisions of the NRA Code (Com. Exs. 557; 597 A-D).

9. Exception is taken to the failure to report the following evidence regarding the pricing policies of the Utah company:

Utah quotes its dealer customer f.o.b. mill prices for delivery at mill. It also quotes and sells its dealer customers at prices f.o.b. destination (Com. Exs. 2703 [15-17]; 3137 C).

The Cement Institute has never had anything to do with the pricing policies of the Utah company nor has the company ever consulted with any of its competitors regarding prices or exchanged price information with them. The evidence is that it has never had any agreements with anyone to quote identical prices or to quote prices in any particular way (Tr. 48105; 26136-37; 26411-42; 37605-06; 38703).

10. Exception is taken to the failure to report the following evidence regarding dealer policies of the Utah company:

Utah sells its cement to anyone it chooses and for any class of work it chooses. The Cement Institute has never had anything to do with any of the company's policies or practices in this regard nor has any competitor. The evidence shows that it has never had any agreement with anyone as to any of these policies or practices (Tr. 48105; 37215-17).

11. Exception is taken to the failure to report the following evidence regarding the company's policy of delivering cement to customers' trucks at its mill:

Utah has always delivered cement to customers' trucks at its mill and has always charged its current price f.o.b. mill for such delivery. It has never added any differential for truck delivery. The company has never had any agree-

ment with anyone to forbid deliveries to customers' trucks at its mill or to charge a differential of any sort therefor (Com. Exs. 3137 C, D; Tr. 48105; 37606-07).

12. Exception is taken to the failure to report that Utah does not come into competition with imported cement and has never had any agreement with respect thereto (Tr. 48105; 29604).

13. Exception is taken to the failure to report that the Institute has never had anything to do with Utah's contract forms, its terms of sale and discount, or its policy with regard to diversions and that the evidence is that the company has never had any agreement with anyone regarding these matters (Tr. 48105; 26442; 38720; 39509-10; 39706-07).

Paragraph 62

(*Santa Cruz*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Santa Cruz Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Santa Cruz is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 62 that the policies and practices of Santa Cruz Portland Cement Company have been adopted or carried on as the result of understanding or agreement with any other respondent and to the failure to report that the

vice president and general manager of the company testified as a witness and showed that the Santa Cruz Company had not adopted or carried on any policy or practice as the result of understanding or agreement (Tr. 8660-61; 42863-64).

4. Exception is taken to the failure to report the following evidence concerning the Santa Cruz Company generally:

Santa Cruz maintains branch offices at Stockton, Sacramento, Santa Rosa, San Jose and Fresno, California, and at Portland, Oregon (Tr. 42859).

Santa Cruz operates one manufacturing plant at Davenport, California, with a capacity of approximately 10,000 barrels per day. The first shipment was made from this plant in 1907. Its raw materials (lime, rock and silica)—an estimated 50 years supply—are located in a canyon three miles from the plant and transported to the mill by an electric railway owned by the company. Fuel oil, power, and other supplies are purchased elsewhere. The plant was located at Davenport to take advantage of the rail and water facilities available for shipping and for incoming supplies. When Santa Cruz began to operate in 1907 its cement was sold as far north as British Columbia, and as far south as New Mexico, in competition with cement imported from points outside the United States. Rail shipments were made as far east as Colorado, in competition with cement shipped from Kansas and points further east. As other plants were built more advantageously located freightwise to these markets, Santa Cruz was compelled to restrict its shipments to points nearer its mill until finally its markets were confined principally to California and Oregon. Subsequently, new mills were constructed even within this territory. In order to retain its shrinking markets, Santa Cruz then decided to reorganize its distribution methods by taking greater advantage of its water facilities at Davenport (Tr. 42860-62). A pier was built extending from its plant 2650 feet into the Pacific Ocean to a water depth of 50 feet (Tr. 42860). Cement is loaded direct from the plant by air blowers to a company-owned boat at the rate of approxi-

mately 2,000 barrels per hour. From this point Santa Cruz distributes its cement in boatloads of about 40,000 barrels, to silos which it constructed at Portland, Oregon, and Alameda, Stockton and Long Beach, California. These silos are equipped with packing facilities identical with those at the Davenport plant (Tr. 8612-13; 42859).

The low cost of water transportation to Washington and Oregon and its influence on rail rates enables Santa Cruz to compete with mills local to Southern Washington, Western Oregon, Northern California and part of Nevada. The lower cost of water transportation to Long Beach, California, permits Santa Cruz to compete in Arizona (Tr. 42860-62).

Santa Cruz' principal markets are Portland, Oregon, San Francisco, the San Francisco Bay area, and Los Angeles, California. Of the total output in 1939, approximately 20 per cent was shipped to points in the State of Washington, approximately 3 per cent to Honolulu, approximately 20 per cent to Southern California and Arizona, approximately three-tenths of 1 per cent having been shipped to Arizona, and the balance of approximately 47 per cent to Northern California (Tr. 42860-62).

The Santa Cruz plant at Davenport has been in continuous operation since May, 1907. Its deposit of raw materials is regarded as one of the most desirable in California because of its extent and its proximity to water and rail transportation and consuming markets (Tr. 42863).

Santa Cruz sells its cement in competition with the following companies: Oregon, Beaver, Pacific, Calaveras, Yosemite, Cowell, Permanente, Riverside, California, Southwestern and Monolith (Tr. 42862-63).

None of the officers or directors of the Santa Cruz Company have ever had any connection with any other cement company. The company's capital stock of which there are 10,000 shares of common outstanding is owned by 274 separate stockholders. More than 50% of this stock is held by heirs of the late W. H. Crocker, none of whom has ever had any connection with any other cement company. There are no other shares or securities of the

Santa Cruz Company issued or outstanding (Tr. 42858-59).

5. Exception is taken to the failure to report the following evidence concerning Santa Cruz' membership in The Cement Institute:

Santa Cruz became a member of The Cement Institute for the first time on June 15, 1933, at the time the Institute was representing the cement industry in the preparation of an NRA Cement Code (Resp. Exs. 2173 A-D; 2174 A-D; Tr. 2809; 8611). The company never received or used freight rate books published by The Cement Institute (Com. Ex. 595 E; Tr. 3156; 16852-53) and never participated in any of the statistical services of the Institute (Com. Ex. 595 C; Tr. 2809; 16710-11). It has never filed land grant rate information with or received any land grant rate information from The Cement Institute (Tr. 8650-51). Santa Cruz has never reported its capacity figures to The Cement Institute (Tr. 8611).

6. Exception is taken to the failure to report the following evidence with regard to bids and bidding practices of the Santa Cruz Company:

It is the practice of Santa Cruz in bidding on state and federal invitations calling for small quantities of cement to quote its regular commercial prices except where, from past experience in a given area or at a given time the company has reason to believe that in order to get any business, it will be necessary for it to meet lower prices. In bidding in response to state and federal invitations calling for large quantities of cement, Santa Cruz has quoted prices lower than its regular commercial prices (Tr. 8637-38).

Santa Cruz has submitted bids that were not identical with bids of competitors during the period covered by the complaint (Com. Exs. 159[23]; Resp. Ex. 344 K; Com. Ex. 3261; Resp. Ex. 292 M; Com. Ex. 120 B); and since (Com. Exs. 1381-82; Resp. Exs. 384; 3692; Tr. 10237; 10261-62; Resp. Exs. 370; 371; Tr. 10274; Resp. Ex. 372; Tr. 10274-75; Resp. Ex. 373; Tr. 10275).

It has always been the Santa Cruz Company's practice to quote the federal government f.o.b. mill prices when the government so requests. In this connection, it has quoted the federal government both f.o.b. mill prices without regard to destination and f.o.b. mill prices arrived at by deducting the commercial freight rate from its mill to the destination involved from the lowest destination cost it can figure, taking into consideration any land grant rates available to the government. Santa Cruz has never used a "control clause" (Tr. 8670-73; Com. Exs. 159[23]; 111; Resp. Ex. 344 K; Com. Ex. 3261 i; Resp. Ex. 292 M; Tr. 312-13; Com. Exs. 1381-82; Resp. Exs. 384; 3692; Tr. 10234-39; 10261-62; Resp. Ex. 370; Tr. 10272-73; Resp. Ex. 371; Tr. 10274; Resp. Ex. 372; Tr. 10274-75; Resp. Ex. 373; Tr. 10275).

Santa Cruz secures the land grant rate information it uses from railroads and railroads are the company's only source of information in this regard other than official government tabulations of bids (Tr. 8650-51).

The evidence on behalf of Santa Cruz showed that it has never at any time agreed with any competitor, expressly or impliedly, directly or indirectly, to make the same bid for any public contract (Tr. 42864).

7. Exception is taken to the failure to report that the price bid in Com. Ex. 111 F (cited in Paragraph 62) had been filed with the Code Authority and disseminated by it to prospective bidders, and that this price was 36 cents per barrel below the current commercial price filed for the destination in question (Com. Ex. 277 N).

8. Exception is further taken to the failure to report the evidence showing that the price involved in Com. Ex. 1212 (cited in Paragraph 62) was the commercial price for the destination in question (Com. Exs. 2049 H; 2063 D).

9. Exception is taken to the failure to report that the Navy Department bids represented by Com. Ex. 1099 D (cited in Paragraph 62) occurred during the operation of NRA open price filing.

10. Exception is taken to the failure to report the following evidence with respect to the pricing policies of the Santa Cruz Company:

It has always been the policy of Santa Cruz to quote each of its commercial customers of the same class at the same place, the same price at the same time (Tr. 8637-38).

During the World War, the War Industries Board established a price base at Santa Cruz' Davenport mill. Thereafter unless lower prices were encountered, Santa Cruz quoted prices on its cement which, with freight added, reflected the price base at its mill. In about 1929 a competitor issued quotations throughout Santa Cruz' marketing territory which reduced prices at many destinations by as much as 40 cents per barrel. Santa Cruz analyzed these prices and discovered that they reflected price bases of the same amount at all mills in central and northern California including the Davenport mill. Santa Cruz met this competition (Tr. 8615-18; 8685-86; 8711-13; 8785).

In its day to day quotation of prices Santa Cruz uses delivered price lists which it publishes. These lists are sent to its dealer customers to advise them of its current prices. When Santa Cruz changes its prices, it mails out new lists to its customers, salesmen and competitors (Tr. 8626; 8632-35; 8637). These price lists are not published in advance of the effective date of the prices therein (Tr. 8633; 8626; 8643; Com. Ex. 1221).

The testimony on behalf of Santa Cruz shows that it has never at any time agreed with any competitor, either expressly or impliedly, directly or indirectly, to use or employ any particular method of pricing nor agreed with any competitor to quote the same price as such competitor for cement, at any place or to any customer (Tr. 42863-64).

11. Exception is taken to the failure to report the following evidence with respect to trucking policies of the Santa Cruz Company:

Santa Cruz has never made any deliveries of cement to customers' trucks at its mill (Tr. 8647). The company makes deliveries to customers in company hired trucks when requested to do so. The cost of such truck delivery is about the same as the cost of rail delivery (Tr. 8648-49).

Tr. 8645 cited in Paragraph 62 has no bearing on the trucking practices of Santa Cruz.

12. Exception is taken to the failure to report the following evidence with regard to dealer policies of the Santa Cruz Company:

The sales policy of Santa Cruz is to sell only to dealers, the United States Government and State Governments, railroads and railroad contractors, contractors doing paving or bridge work for the United States and State Governments, owners or contractors purchasing for major water development, power development, flood control projects and irrigation districts, manufacturers of cement and concrete products, and commercial concrete mixing plants; Santa Cruz does not sell its products retail. Dealers selected must carry a general line of building materials as well as cement. Santa Cruz covers its sales area at the present time by twelve salesmen who are located at points scattered through its sales area (Tr. 42862).

13. Exception is taken to the reference to Tr. 9151 as evidence of meetings involving Santa Cruz. This citation has no bearing on the subject. Further exception is taken to the failure to report that Santa Cruz has been represented at no meeting at which market conditions or prices have been discussed with the possible exception of some meetings held at the time that members of the industry were engaged in drafting an NRA Code for the cement industry (Tr. 8660-61).

Paragraph 63

(*Signal Mountain*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Signal Mountain Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Signal Mountain is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 63 or elsewhere in the Report that the practices and policies of Signal Mountain have been adopted or carried on as the result of understanding or agreement with any other respondent on the ground that there is no evidence to support it. Exception is further taken to the failure to report that responsible executives of Signal Mountain appeared as witnesses and showed that the company has had no such agreement or understanding (Tr. 47569, *et seq.*; 13321, *et seq.*).

4. Exception is taken to the failure to report that Signal Mountain markets its cement only in the southeastern area of the United States, and accordingly only comes into competition with the limited number of other respondents who do business in that area. It has found it necessary to abandon some of its earlier markets because of lower prices introduced by new mills and keener competition in those areas (Tr. 47582; Com. Exs. 975-13A).

Evidence showing that in recent years Signal Mountain has made renewals and improvements in its plant other than repairs, and the extent of such improvements, was rejected by the Examiner (Tr. 47581).

5. Exception is taken to the failure to report that Signal Mountain rejoined The Cement Institute in June 1933 in order to participate in the emergency NRA legislation (Tr. 13371-72).

6. Exception is taken to the inadequate and misleading reference to the pricing methods of Signal Mountain and to the failure to report the testimony relating thereto including the following:

Signal Mountain's policy and practice is to offer its cement delivered on terms and conditions that are either as favorable or more favorable than other cements at the

same place and at the same time. Information regarding competitors' prices is obtained from the field. The company's salesmen are furnished with lists of the company's prices at all destinations where they sell (Tr. 47586-88). The company has not always adhered to its published commercial prices (Tr. 47611-14; 47590-91).

Signal Mountain's mill has not been a basing point, but the company has been completely free to inaugurate a base at any time it might choose to do so (Com. Exs. 975-13G). In attempting to meet competitive prices at destinations Signal Mountain never has any assurance that its own price will be as low as the lowest quoted by any competitor. It can only tell by the subsequent daily checking by its sales force and advice from customers (Tr. 47617-18). The company sells in areas where prices do not reflect any base figure. Moreover, the patterns of prices which do appear in parts of its sales area vary from time to time (Tr. 47615).

7. Exception is taken to the failure to report the following evidence regarding the bidding policies and practices of Signal Mountain:

Signal Mountain has bid prices to federal and state agencies which were not identical with prices of competitors (Com. Exs. 771; 772; 777; 2452; Resp. Ex. 896), and has furnished f.o.b. mill bids to agencies of the federal government (Tr. 47591-92; Com. Exs. 771; 772; 776, 777; 789; 792).

The management of Signal Mountain independently conceived and adopted two departures which have occurred in connection with bids to the federal government where land grant rates were involved. The company originated the quoting of a destination cost to the United States government and the "control clause" by filing it with the Code Authority in connection with a bid to the TVA. The destination cost and "control clause" filing was disseminated to other potential bidders by the Code Authority and it came into general use by a number of the respondents thereafter. Signal Mountain has continued to use the "control clause" since the end of the NRA Code period although most of its competitors have stopped using it. (Tr. 47592

93; see also exceptions to Paragraphs 130-138, *infra*). Further evidence was rejected by the Examiner (Resp. Exs. 2830-34 for id.; 3170 A-C for id.).

In bidding to the United States Government where land grant rates were involved, it had been Signal Mountain's practice, until February 1937 to carry out fractions of a cent in its bids to the last decimal. In a bid to the War Department at Fort Oglethorp, Ga., on February 2, 1937, however, the Signal Mountain company eliminated all fractions of a cent in its bid and received the award on that letting because it was low bidder. Although Signal Mountain continued to do this on subsequent bids, it found that competitors began to do likewise and the temporary advantage which Signal Mountain had gained on the initial bid where it adopted this practice, was lost thereafter (Resp. Ex. 896; Tr. 25329-30; 25333-34).

8. Exception is taken to the failure to report that, on Com. Exs. 1088 and 1096 (cited in Par. 63), Signal Mountain bid the commercial market prices which prevailed at the destinations involved (Resp. Exs. 968-73; 915-19; 902; 903; 906; 945; 946). The land grant rates used on this letting were furnished on request by the railroads (Resp. Exs. 962-67).

9. Exception is taken to the failure to report that land grant rates available to the government in connection with Com. Ex. 180 (cited in Paragraph 63) were also furnished on request by the railroads (Resp. Exs. 897; 2284 A; 3046 B; Tr. 25336-37; 31894-95).

10. Exception is taken to the failure to report that, in the southeastern area of the United States, Signal Mountain initiated the practice of prepaying freight on all commercial sales. This was so favorable to the customer that other sellers had to meet the competition (Tr. 29894; 36169-72).

11. Exception is taken to the reference to evidence concerning policies of the Trinity company and the meeting attended by representatives of that company, on the ground that Trinity was not under the same management as Signal Mountain until 1933 (Tr. 13321; 47570-71) and the

evidence cited in Paragraph 71 relates to the activities of the former management (Com. Exs. 1131 J; 3005 A).

12. Exception is taken to the reference to meetings attended by the Florida company on the ground that there is no evidence of any meetings attended by the Florida company other than Institute meetings.

Paragraph 64

(Southern States)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote at page 9 of the Report that Southern States is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies and practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support the implication and none is cited.

2. Exception is taken to the assertion in Paragraph 82 and in footnote at page 9 of the Report that Southern States is "identified" or connected with "group" activities or "industry" policies and practices on the ground that the evidence cited by the Examiner in Paragraph 64 (as well as other evidence outlined below) shows that the policies and practices of Southern States have been adopted and used independently and without agreement, understanding or collusion.

3. Exception is taken to the failure to report that the practices and policies of Southern States have been different in several respects from those reported by the Examiner as general industry practices and policies (See citations to Paragraph 64 of the Report, particularly the following: Tr. 37602-17 and Com. Exs. 976-15F; and see below).

4. Exception is taken to the failure to report that the Vice-President and General Manager of Southern States appeared as a witness on its behalf and testified fully re-

garding the practices and policies of the company. This testimony was directed to the charges in the complaint as well as to evidence offered by Commission's counsel affecting Southern States and included all subjects referred to in Paragraph 64 of the Report (Tr. 37467-668; see more specifically below).

5. Exception is taken to the failure to report the following evidence in connection with the location and organization of Southern States:

The company is not affiliated in any way with any other cement manufacturing company nor are any of its officers or directors (Tr. 37473-74). Although the mill was built in 1903 substantial improvements have been made in recent years (Tr. 37474; 37476-77; 37478-79). In addition, the quality of the cement produced by the company has been constantly increased so that at all times it has exceeded the minimum standard specifications (Tr. 37482; 37484-87).

Although Southern States accepts orders for business and ships cement over a fairly wide area in the southeast, it attempts to keep its sales within the area where the company has a freight advantage over competitors. The largest percentage of its output goes into northern Georgia, western South Carolina, and western North Carolina (Tr. 37499; Resp. Ex. 2816). In its market area Southern States competes with about a dozen other cement manufacturers (Tr. 37498). The company was forced out of the Florida market because of low prices and the proximity of competitive mills; and finds it impossible to sell cement in Birmingham, Alabama, and Chattanooga and Knoxville, Tennessee, three substantial markets comparatively nearby but near or at which competitive mills are located (Tr. 37499-500).

5. Exception is taken to the failure to report the following in connection with the membership of Southern States in The Cement Institute:

The citations furnished in support of Paragraph 64 of the Report show that The Cement Institute has not interpreted or policed the policies and practices of Southern

States in any way and that the competitive action of the company has not been restrained or restricted by its membership in The Cement Institute (Tr. 37602-03). They also show that Southern States never subscribed to the Institute Code of Ethics and that the company never had any understanding or agreement to adhere to any such code of ethics in the operation of its business (Tr. 37608).

The other evidence shows that neither The Cement Institute, its Board of Trustees, committees or officers of the Institute have ever had authority to bind Southern States regarding its marketing policies, prices or practices (Tr. 37637-38).

The citations furnished in support of Paragraph 64 also show that Southern States has had no understanding or agreement regarding the use or non-use of The Cement Institute freight rate books and that the company finds the books convenient in the general operation of its business and a source of economy (Tr. 37606; 37525-26; 37613-15; 37638-39).

The evidence also shows that the statistical service of The Cement Institute is used by Southern States in connection with other similar statistical data to which the company subscribes; that it has not been used in connection with any plan for sharing or allocating business or for controlling or curtailing production; and that Southern States has not been party to any such plan (Tr. 37598-99).

6. Exception is further taken to the failure to report the evidence showing the following in connection with the pricing practices of Southern States:

The company has had no understanding or agreement with competitors to sell its cement in any particular way or by any particular method. It does not sell all of its cement at delivered prices and there has never been a period when it did (Tr. 37501). All cement buyers, however, determine from whom they will buy by comparing the laid down cost of cement at destination. For that reason the greater part of the sales of Southern States are made at delivered prices (Tr. 37501-02). Proof showing that numerous flat f.o.b. mill bids by Southern States were ignored by government agencies in awarding contracts was

rejected by the Examiner and a number of f.o.b. mill bids by Southern States to the Government were also rejected (Tr. 37588-93; Resp. Exs. for id. 2829-34).

Normally the company is a price follower but there have been occasions when Southern States initiated new prices (Tr. 37502). The company keeps advised from its salesmen and customers of the prices at which cement is selling in the various towns in its area. It keeps a list of such prices and always knows the market price at a given point (Tr. 37503-04; 37507). Further evidence to show this was rejected by the Examiner (Resp. Exs. 2820 A-L for id.). The company has kept such a record of market prices for at least thirty-five years and could not do business if it did not keep currently advised of changes in prices at destination (Tr. 37509; 37507). It has happened that the company was not aware of a change in price at a given destination and has billed a customer at a price higher than that quoted by some other competitor. In such cases the customer has immediately notified the company and requested that the lower price be met. Such requests must be honored or the customer would purchase elsewhere (Tr. 37503-06; Resp. Exs. 2817; 2818; 2819).

Although Southern States, as well as its competitors, broadcasts its price quotations to customers, the company has frequently quoted prices lower than its published prices. It has also found that its competitors have done likewise. In fact, Southern States, in order to obtain a given order, has had to lower its price as much as twenty cents per barrel below the known market price (Tr. 37510-11; 37512-13; Resp. Ex. 499).

Southern States attempted without success to increase prices in January, 1939 (Tr. 37516). Other attempted price advances in the southeast have been unsuccessful (Tr. 37518).

The terms "base price" and "base mill" have been familiar ones to Southern States for the past twenty-five years but the company has never had any understanding that it would use certain mills as base mills or that it would observe certain prices at base mills. The base figure at a mill can usually be determined by collecting a number of

prices at destination and deducting the freight rates until a constant figure is found at one mill (Tr. 37603-04). Between seventy-five and eighty per cent of the contractor business of the company does not reflect any base figure (Tr. 37645).

The evidence shows that Southern States has no understanding that its prices will be identical with the prices of competitors nor has it any arrangement for maintaining particular price levels (Tr. 37605-06).

The company does not adopt prices quoted by its competitors but attempts to meet the lowest price quoted by a competitor and sometimes quotes below it (Tr. 37651). In cases where Southern States attempts to anticipate what prices might be at a given point by figuring back to some base, it has no assurance or foreknowledge that the anticipated price will be the lowest (Tr. 37651).

7. Exception is further taken to the failure to report the following regarding public bids submitted by Southern States:

Southern States has submitted numerous bids where its prices were not identical with those of competitors and has quoted and sold the government f.o.b. mill (Resp. Exs. 2823; 2824; Tr. 37588; 37561; 37564; 37645). Other evidence to this effect was rejected by the Trial Examiner (Resp. Exs. for id.: 2829-34). Where, as in the vast majority of cases the Government asks for delivered prices, Southern States quotes its regular commercial prices (Tr. 37661). F.o.b. mill requests for bids by the government have been the exception in Southern States' territory; practically all requests were for destination prices prior to April, 1938 (Tr. 37569; 37570; 37577). Further evidence shows also that since April, 1938 f.o.b. mill invitations are seldom received except from the Alabama W.P.A. Procurement office (Tr. 37580-83).

The company's prices have never been arrived at by agreement, understanding or collusion and it has felt wholly free to quote any price it pleased (Tr. 37605-06; 37597).

When land grant rates have been available to the government Southern States has obtained them from the affected railroads, independently, and without collusion or

agreement with competitors (Resp. Exs. 2826-28; 2835-39; Tr. 37585).

8. Exception is taken to the failure to report that Southern States' prices on Com. Exs. 1082; 1096 A (cited in Paragraph 64) were the current commercial prices at the destinations involved (Resp. Exs. 915-19; 902; 903; 906; 945; 946; Tr. 37661).

9. Exception is taken to the failure to report the following evidence regarding truck delivery of cement by Southern States:

Southern States has never had any policy or practice of refusing to make deliveries to customers' trucks at the mill and it has never made any extra charge for such deliveries (Tr. 37548-49). All requests by customers for delivery to their trucks at the mill have been honored except one (Tr. 37547-48). The company has never had any agreement with any respondent companies as to whether or not it would or would not load trucks at its mill (Tr. 37549; 37606-07).

When delivery is made to trucks, Southern States charges the market price at the point where the cement is to be used, less the freight to that point (Tr. 37610).

10. Exception is taken to the failure to report the evidence regarding the dealer policies of Southern States and its policy with respect to direct selling:

Southern States does not select its dealers on the basis of any specific definition nor is it governed by what competitors may do or think with respect to a given customer (Tr. 37528-29). The company has had pressure brought to bear against it by associations of dealers but, in all cases, successfully resisted that pressure (Tr. 37529-32).

About eighty per cent of the sales of Southern States are made to dealers and the remainder are direct sales. The company however is not operating under any published announcement as to the kind of work it will sell direct or the kind of work it will sell through a dealer (Tr. 37528; 37539-40; 37543). Direct sales are increasing gradually and companies competing with Southern States have been selling the same kind of work through dealers

in some cases and direct in others, and Southern States has been attempting to meet this competition (Tr. 37539-40). Southern States has never had any agreement or understanding with any competitors regarding the kind of work it would sell direct or through dealers (Tr. 37546; 37607).

11. Exception is taken to the failure to report the evidence regarding other sales policies and practices of Southern States put in issue by the pleadings:

The company has not found any diversion problem existing in recent years and has had no agreement or understanding with competitors regarding the question of diversions (Tr. 37546-47). Southern States does not use any bill of lading stamp (Tr. 37547).

Southern States has attempted to sell in markets where competition existed from foreign cement but has been unsuccessful. It has never taken any action with respect to dealers who handled foreign cement nor has it taken steps to combat the sale of foreign cement (Tr. 37550-51).

The evidence shows that none of the terms of sale used by Southern States has been used as the result of agreement or understanding with competitors (Tr. 37556-57; 37561; 37602; 37607). Many of its terms differ from those of other cement companies, and in fact Southern States has used the same contract form without revision since 1920 (Resp. Ex. 2822; Tr. 37557; 37559-60).

2. Exception is further taken to any implication that Southern States has participated in meetings other than Institute and Code meetings for improper purposes, there being no evidence to support it. Exception is taken to the implication that Com. Exs. 3235-Z108 refers to a meeting attended by Southern States. That exhibit shows on its face that Southern States was not represented.

13. Exception is taken to the failure to report that the files of Southern States were destroyed by a fire in March, 1937 (Tr. 37585).

Paragraph 65

(*Southwestern*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Southwestern Portland Cement Co. is "identified" or connected by the evidence with any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Southwestern is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication that the acts and practices of Southwestern were adopted or carried on pursuant to agreement or understanding with any respondent on the ground that such implication is not supported by the evidence; and to the failure to report that five executives of Southwestern appeared as witnesses and testified fully concerning the origin and development of the various practices and policies of the company at issue, including the subjects referred to in Paragraph 65 of the report. These executives were the Vice-President and General Manager of the company (Tr. 8790-874; 47663-70), the Vice-President and Manager of the Osborn, Ohio, Office (Tr. 28705; 29395; 10895-22), the Sales Manager at the El Paso, Texas, Office (Tr. 38854; 39424), the Sales Manager at the Victorville, California, Office (Tr. 47658-63; 8883-972) and the Traffic Manager and Assistant Sales Manager of the Osborn Office (Tr. 39185-215; 39424-64). The testimony of these witnesses and the exhibits offered through them showed that none of the practices and policies of Southwestern was adopted or pursued as a result of agreement or understanding with any respondent (see more particularly below).

4. Exception is taken to the failure to report the following evidence relating to the general operation of the company and the location of its mills:

Southwestern operates three mills, the total capacity of which is from 4,500,000 to 5,500,000 barrels per year (Tr. 28726; corrected at 29258). Southwestern is not connected or affiliated with any other cement company. The company has had no agreement or understanding with competitors regarding the amount of cement it would produce at any time (Tr. 28726; 28735, 47666; 28722).

The company's first mill was built at El Paso, Texas, in 1907-08 at the site of an ample supply of raw materials. Its capacity is 1,000,000 barrels per year. To the extent permitted by the Trial Examiner it was shown that the mill has been kept up-to-date and is modern and efficient (Tr. 38925; 38926-27; 29062; 28707). Further evidence concerning the operation of this mill was stricken by the Trial Examiner (Tr. 38965-70).

Since this mill was built many other mills have been constructed at points nearer to markets formerly served by El Paso and accordingly the prices for cement shipped from this mill have been reduced because of the increasing competition and the market area of the plant has shrunk. Southwestern now markets cement from its El Paso mill in western Texas, eastern Arizona, New Mexico and Mexico (Tr. 38933-36; 38995-96; 38931-32).

The quality of the cement produced at El Paso has been improved through the years and the company has increased the types of cement it produces at that mill (Tr. 38927-29; 29043). Southwestern has never sold cement to a competitor nor exchanged any orders with any competitors from its El Paso office (Tr. 39177).

The Victorville mill was built in 1915-1916 on a site selected to take advantage of raw materials. This mill has a capacity of 1,700,000 barrels and has been constantly kept up-to-date so that it is a modern and efficient unit (Tr. 8794; 47665; 8792). From this mill Southwestern ships cement in southern California, Arizona, southern Nevada, and to Hawaii (Tr. 47666; 8794).

Southwestern's Osborn mill was built in 1926 at a period of rapidly increasing cement demand and on the site of a

deposit of good raw materials (Tr. 8793; 28708; 28714-15). The mill is an up-to-date and efficient unit with a capacity of from 1,800,000 to 2,000,000 barrels per year. For a few years after it was built, this mill ran at capacity. In 1930 it shipped 82.7 per cent of its capacity (Tr. 28715-16; 29064; 8792; 28718-19; 28754; Com. Ex. 2895; Tr. 39451).

There are seasonal variations and fluctuations in demand in the area where Osborn markets (Tr. 28746-47; 28753), there are also shifts in demand due to large projects. These variations affect cost of manufacture (Tr. 28748) and have required increased storage capacity (Tr. 28750).

From the Osborn mill Southwestern ships cement in most of Ohio, almost all of Indiana, half of Kentucky, western Pennsylvania and West Virginia and southeastern Illinois (Tr. 28735).

Each of Southwestern's three mills is operated as a separate unit having independent determination of the respective pricing policies (Tr. 8795; 8869; 47669; 29232-33).

5. Exception is taken to the failure to report the following evidence concerning representatives of Southwestern who are referred to in the report and in citations to the report:

William J. Jennings was never manager of the Osborn plant and was only the sales manager at Osborn. He retired in 1937 (Tr. 8842; 29219-20).

G. E. Warren was approached to take the job of sales manager at Osborn in 1930 but did not take the job until 1933 (Tr. 28706).

W. R. Blair was unfamiliar with the Texas territory when he became sales manager at El Paso. Accordingly, he attended dealer meetings and discussed many matters with dealers in order to learn as much as he could about the area (Tr. 38898-900).

Frank Powell of Southwestern was never associated with or connected with Castalia Portland Cement Company.

6. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of Southwestern in the area served by its Osborn, Ohio, mill:

Southwestern is a price follower in the area served by its Osborn mill. It quotes the prevailing destination prices it finds quoted in the territory (Tr. 28762; 28790). The company has found that "there can be only one price for standard Portland cement, a known price, or a public price, in a given market at a given time" (Tr. 29035-36).

Osborn usually sells at destination prices because that is where it finds the market to be and it does not have requests from customers for f.o.b. mill sales (Tr. 28923; 28927; 28951). The company has not ordinarily quoted below the lowest quoted prices it finds because it does not think prices in this area are high enough and the company has not netted an amount satisfactory to it at Osborn. Any lower price quoted in the area is always met promptly by competitors and the quoting of lower prices does not increase business. Southwestern itself has always followed prices downward in order to keep the customers which the company has built up in that area. Its friendly customers always give it an opportunity to meet any lower prices quoted to them (Tr. 28769-72; 28773; 28787; 28789; 29409; 28774).

Information regarding the prices of competitors is obtained from customers and not from competitors. The company has no advance knowledge of what competitors' prices will be; has had no discussion with competitors regarding prices; nor any agreement or understanding with respect to the prices which Southwestern would quote or the method by which it would arrive at its prices (Tr. 28763-65; 28810-11; 28820; Resp. Exs. 1645; 1668; 1770-71; Tr. 28864; 28868; 28769; 28775-76; 28761-62; 29242; 29269-71; 29037; 28809; 28852).

When notice of changes in prices is obtained from the field the company checks at many points throughout its

selling area to determine what the pattern is or what the changes in price amount to. When prices of a given company reflect a constant net at some mill such a mill is called a base mill (Tr. 28763-64; 28813-14).

The Southwestern Company has not operated its Osborn mill as a base mill because other mills in the area immediately surrounding Osborn have been operated as bases and the volume of available business in the area where Osborn has any freight advantage does not justify Osborn using a base at its mill. The company would not be able to undersell competitors if it should establish a base at its mill. The company, however, has always been free to do so (Tr. 28787; 28789-90).

The company keeps a file of all of its prices at the destinations where it solicits business and uses this file for quoting prices and billing (Tr. 28776; 28781; Resp. Ex. 1641).

The company finds that the prices quoted by competitors are sometimes lower than those quoted by Southwestern and that prices are quoted by competitors lower than their published prices to the trade. The Osborn office sometimes meets the secret price cuts of competitors (Tr. 29317; 29325; 28875-76; 28883-84; 28888).

7. Exception is taken to the failure to report the following evidence regarding the pricing policies and practices of Southwestern in the area served by its El Paso, Texas mill:

Sales from the El Paso mill are made both at delivered prices and at f.o.b. mill prices. None of El Paso's customers have freight rate departments and do not have freight rate information available. Many of them have specifically requested that they not be quoted f.o.b. mill (Tr. 38937; 38856-57). Further evidence to this effect was rejected by the Trial Examiner (Resp. Ex. 2594 for id.). Since its operations began, it has figured its delivered prices by adding to a figure at the mill, the package, discount and cost of transportation (Tr. 38941-42). At distant points it meets the lowest prices of any competitor found and must do so in order to sell (Tr. 38944-45). Price and market information is obtained from its customers

and not from competitors (Tr. 38945-46; 38948-60; 39238-39; Resp. Ex. 2979). El Paso constantly checks existing prices at all major points of consumption (Tr. 38947). Southwestern finds many cut prices in the territory served by its El Paso mill (Tr. 39220; 39229-32) and the company has granted price concessions in that territory (Tr. 39234).

When a competitor reduces prices, customers served by the El Paso mill give it a chance to meet the lower price before taking their business elsewhere (Tr. 28945). The company meets price reductions immediately (Tr. 38945). Likewise, the company has found that when it quoted prices lower than competitors, they immediately met the reduction, and the volume of its sales has not increased (Tr. 38945).

El Paso never has reported base information to the Institute or to competitors and has never received lists of bases from competitors (Tr. 38948; 38866). The evidence shows that El Paso has not had any agreement as to its method of calculating prices (Tr. 39239-40); as to which mills shall be base mills and which non-base mills (Tr. 29249; 39259); or with regard to the price of cement (Tr. 39235).

El Paso gives advance notice to customers of the effective date of any increase in its prices, but the amount of this notice has varied (Tr. 38953).

El Paso keeps its own file of prices and freight rates (Tr. 38892-93; Resp. Ex. 2968). It has some special low freight rates on large carloads and gives the benefit of these low rates to customers (Tr. 38907; 39094).

8. Exception is taken to the failure to report that the evidence shows the following regarding the pricing policies and practices of Southwestern in the area served by its Victorville, California, mill:

Victorville does not "compute" prices (Tr. 8899-900). Victorville has never been a base mill (Tr. 8934) and has never based its prices on Crestmore (Tr. 8935), although it may have quoted prices which appeared to reflect a base at that point (Tr. 8935-36). Freight calculations have nothing to do with Victorville's prices; it does not use the basing point method; and does not recognize "the existence"

in its area "of a basing point system modified by a zone system" (Tr. 8899-900; 8897; 8937; 8959; 8939). The company's prices in a large part of Southern California are the same even though transportation costs differ (Tr. 8890-91). It quotes prices independently of competitors, but bases them on the best knowledge it has of competitors' prices (Tr. 8937-38; 8903). The company has been free to quote or sell at any price it desires, but knows it cannot sell at a higher price than the lowest quoted in a given market (Tr. 47662, 8892; 8902; 47660). Southwestern has not had any understanding or agreement relating to its prices or the manner in which it arrives at them (Tr. 47661-62).

Competitors in the area where Victorville sells give secret prices (Tr. 47661). Victorville also has quoted prices different from competitors (Tr. 8903) and has attempted increases that competitors did not follow (Tr. 8903-04; 8909-11). It has found that price reductions and secret price concessions do not increase the volume of Victorville's sales (Tr. 47661). Customers normally continue to purchase from their regular sources of supply in the face of a reduction if their supplier will meet the reduction (Tr. 47661).

Victorville keeps a price list which "has always been based upon the last known price either established by us or competitors, at any destination" (Tr. 8894; 8897). It has been publishing price lists since the effective date of the NRA Cement Code (Tr. 8894; 8901). It has not received price lists from competitors since the *Schechter* decision (Tr. 8896).

9. Exception is taken to the failure to report that the evidence shows the following with respect to the bidding practices and policies of Southwestern at its Osborn mill:

Ordinarily, in bidding on invitations from government agencies, Southwestern quotes its going commercial prices shown on its price records. The company finds that state purchasing agents as well as federal purchasing agents request delivered prices (Tr. 28937; 28951; 28970; 29022-23; 29312).

Some departments of the federal government began asking for bids f.o.b. mill in 1938. Osborn has responded

with f.o.b. mill bids on a number of federal government invitations (Tr. 28951-52; Resp. Exs. 2349; 2351; Com. Exs. 767; 1899; 1876).

Although Southwestern submitted an f.o.b. mill bid on Commission's Exhibit 1339 from its Victorville mill and El Paso mill it did not submit any bid in response to the invitation from its Osborn mill. Among other reasons for not bidding at Osborn was the opposition of the company's dealers in that area (Tr. 28953-55).

The federal government is a relatively minor customer of Southwestern in the area of its Osborn mill. There are no land grant rates available to the government in that area and Osborn has never used a "control clause" in bidding to the federal government. It has never asked to withdraw a bid once submitted and has had no understanding or agreement with competitors regarding prices to the federal government (Tr. 28956; 28971; 39450-51).

Southwestern's price on the letting referred to in Commission's Exhibit 373 (cited in Paragraph 65 of the Report) was its current market price at the destination involved (Resp. Exs. 1739-43; Tr. 39450-51).

Southwestern's bid on the invitation referred to in Commission's Exhibit 178 A (cited in Paragraph 65 of the Report) was 16 cents lower than the company's commercial price at destination (Tr. 28982). Southwestern received information from the Code Authority concerning the filed prices of competitors for this letting and met those prices (Tr. 28985-90; Resp. Exs. 1717-22). Southwestern did not bid on subsequent relettings for this project because the filed prices on the later lettings were lower than Southwestern cared to quote (Tr. 28991).

10. Exception is taken to the failure to report that the evidence shows the following with respect to the bidding practices and policies of Southwestern in the area of its El Paso, Texas, mill:

The only requests for mill prices received by the El Paso mill come from the United States Government, and Southwestern has quoted f.o.b. mill prices on such inquiries (Tr. 38936-37; 38940-41; 39012; 39088-89; 39092-93; 39116; Com.

Exs. 3261 i, J. K, O, S, R; Resp. Exs. 302; 296; 297; 2996; 384; 3006).

Except where land grant rates are involved the government always invites delivered prices and, in such cases, where the invitation involves a small amount of cement, El Paso bids its current commercial prices. The company has found that small government orders are more expensive to handle than its normal dealer business. The company has always made special low prices to the United States Government upon large projects in the area of its El Paso mill (Tr. 39006; 39014-15; 38963-64; 39004-05; 39096-99; 39008-09).

El Paso has never consulted with competitors regarding any bid to the federal government and has had no agreement or understanding with competitors regarding its bids to the federal government (Tr. 39238; 39163; 39085-86; 39013). The company secures applicable land grant rates from railroads, from the government itself, and sometimes determines them by its independent computation. It has not had any understanding with competitors regarding land grant rates (Tr. 39015; 39017-18; 39085-86).

On bids from El Paso, Southwestern has used a "control clause" but had abandoned the use of such a clause prior to July 1937. It had no understanding or agreement with competitors regarding the adoption or use of this clause (Tr. 39013).

If it were confined to quoting inflexible f.o.b. mill prices, El Paso could not sell cement and would incur financial ruin (Tr. 38999; Resp. Exs. 2980-86).

11. Exception is taken to the failure to report that the evidence shows the following with regard to the bids and bidding practices of Southwestern from its Victorville mill. Victorville has quoted f.o.b. mill to the federal government and bid f.o.b. mill in response to Commission's Exhibit 1339 in April 1938 (Tr. 47667; Resp. Exs. 3721-26; 3691; 273; 355; 292 M; Com. Exs. 129; 1099 A; 3261 N; 135; 124). Sales from Victorville to the United States Government have been made at prices below the company's dealer price list (Tr. 8919-20). The company has also submitted a few joint bids from the Victorville mill where the quantity of

cement was so large that the company could not handle deliveries. Such joint bids were approved by the Comptroller General (Tr. 47667-69).

As Victorville, Southwestern has independently calculated the land grant rates available to the government (Tr. 8946).

12. Exception is taken to the failure to report in Paragraph 65 that Southwestern has submitted bids at all of its mills which were not identical with the bids of competitors (Com. Exs. 767, 129; 1303; 170; 3261 Q, S; 125; 119; 176; 177; Resp. Exs. 3691; 3001; 3005; 3006).

13. Exception is taken to the failure to report the following evidence regarding the attitude of the Southwestern company as to its prices:

The company does not consider the net at the mill or the mill base figure to be its price. It posts the full price including freight in its books of account (Tr. 28740; 28764; 28962).

When buyers pay the freight they pay it for Southwestern's account and the company handles claims for loss or damage in transit and claims for overcharge against the transportation agent (Tr. 28962-63; 29359; Resp. Exs. 1693 B; 1644 B; 1696 B; 1697 B; Tr. 28962; 28969; Resp. Exs. 1643-44; 1693-97; Tr. 38938-39; 38858; 8941).

14. Exception is taken to the failure to report the evidence showing that Southwestern has had no understanding or agreement regarding its practices and policies with respect to direct and dealer sales in any of the areas where it sells (Tr. 47662; 29073; 29077; 29103; 29095; 29382-83; 38956-58; Resp. Exs. 2977 A-B; Tr. 38981; 39416-18; 38903-04; 39284-85; 38890); and to the further failure to report that its practices at its respective mills have differed (Com. Ex. 1283; Tr. 38958-59; Resp. Ex. 1757; Tr. 29108; 29082-83; 29075; 29108; 29333-35).

15. Exception is taken to the failure to report the following evidence regarding direct and dealer sales by Southwestern:

At Osborn:

About 80 per cent of the sales of this mill are to dealers and almost 20 per cent to contractors (Tr. 29108-09). Its classification was determined independently, but follows, generally, that contained in Article XI of the NRA Code. Osborn independently published announcements of its policy in March and April 1935 in response to customer demand that it meet the more favorable policies announced by competitors (Tr. 29082-83; 29097; 29082-85; 29088; 29098; Resp. Exs. 1746-56; 1759-67; Tr. 29094-05; 29103). Osborn, however, varies its practice to meet local problems and has not rigidly adhered to its announced policies (Tr. 29074; 29082-83; 29102; Resp. Exs. 1757; Tr. 29075; 29108; 29333-35; 29078-79).

Southwestern did not attend any meeting or conference with competitors regarding 1935 policy announcements. It learned of them through its customers when they were announced by competitors (Tr. 29383; 29104; 29098-99; Resp. Exs. 1759-67; Tr. 29103; 29082-85; 29088-89; Resp. Exs. 1746-56).

Osborn selects its dealers on the basis of ability to store, handle, and deliver cement and other building materials and varies its standards, depending on the nature of a given community (Tr. 29070-71). Competitors sell to dealers which do not meet Southwestern's standard. It has not had any agreement to limit its sales to those who meet a particular definition (Tr. 29072-73). Dealer associations have not influenced Osborn in this respect but individual customers' good will is important (Tr. 29071-72; 29122-23).

At El Paso:

About 80 per cent of El Paso's shipments go to dealers (Tr. 38953-54). Originally it shipped anyone who ordered

a carload or more, but as time went on the company began to move cement primarily through dealers where direct shipment was inconvenient. It found that dealer distribution was more efficient and economical; that dealers were important in the retail distribution of cement; and that it lost customers when it competed with them by selling direct (Tr. 38954-58). El Paso now ships through dealers when dealer service is necessary. It has no rigid standard for choosing its dealers, but selects them on the basis of their ability to market its cement and whether or not they are a good credit risk (Tr. 28960-61). Competitors sell to persons El Paso does not consider to be dealers and El Paso has made its selection independent of dealer associations or competitors (Tr. 38961; 39304; 38902-04).

Article XI of the Cement Code made no substantial change in El Paso's direct and dealer sales; when it was suspended El Paso continued to follow it in a general way (Tr. 38958; 39167; 38961; 39171). The circumstances under which it subsequently modified its policy independently and without understanding or agreement, to meet more favorable policies announced to customers by competitors was testified to fully (Tr. 38980-81; 39417; 38903-04; 38956-58). Since 1935 El Paso has not adhered to any rigid policy, but has varied its policy; for example, it determines whether it will sell to contractors by the merits of each particular case; it has sold direct on many emergency relief projects; in several respects its practice has differed from that of competitors (Tr. 38958-59).

At Victorville:

Victorville's most important customers are its dealers. It never had a definition of a dealer until NRA. It has had no agreement or understanding regarding a definition of a dealer or as to the kind of work it will sell through dealers or direct. It makes direct sales to jobbers and has bid on many emergency relief projects (Tr. 47667; Resp. Ex. 3750 H; Tr. 47662; 47661; 47663; Com. Exs. 134; 135; 175; 1286).

15. Exception is taken to the failure to report the following evidence regarding truck delivery by Southwestern at its three mills:

Osborn:

Osborn does not permit trucking, except to accommodate a customer in an emergency and there have been very few, if any, requests to truck (Tr. 29125-26).

At one time trucking was permitted from Osborn. It did not operate too satisfactorily and there were various difficulties with dealers resulting from this practice. In addition, trucking put Southwestern in the retail business when it is geared as a wholesale business (Tr. 29131-33).

Osborn has no agreement with competitors not to allow trucking (Tr. 29135).

El Paso:

El Paso still sells at an f.o.b. mill price for truck delivery (Tr. 39077-78; 39080-83) and also delivers by truck from the El Paso mill (Tr. 38907; 28916). Although El Paso allows trucking it discourages it because it has been found to be dangerous (Tr. 38908; 38906; 38910; Resp. Exs. 2970; 2974; 2975; 2976). The Examiner rejected some of the evidence to show this (Tr. 38912; Resp. Exs. 2971-73 for id.).

El Paso has found it more expensive to load trucks (Tr. 38913; 38916; 39080-83). The company has not had any agreement regarding truck delivered (Tr. 38919; 38915) and its practice concerning trucking is not the result of any agreement (Tr. 38908).

Victorville:

Victorville moves 80 per cent of its cement by truck (Tr. 8941-42). It allows dealers to come to the mill and take truck delivery at an f.o.b. mill price (Tr. 8942-43; 8960; 8968-69). Victorville has not had any agreement relating to methods of delivery or charges therefor (Tr. 47662).

16. Exception is taken to the failure to report that the evidence shows the following regarding Southwestern's membership in The Cement Institute:

Southwestern joined the Institute for its Osborn mill in 1930. It joined for its El Paso and Victorville mills in 1933. Prior to 1933 the Institute had no memberships in the area of Southwestern's El Paso or Victorville mills (Tr. 29152-53).

El Paso is no longer a member (Tr. 39140).

The Institute has not had anything to do with the price of cement; it never interfered with competitive conditions; it was not regarded as a formulator of the company's practices or policies and never was instrumental in formulating any policy of Southwestern; the company reached no understanding or agreements regarding marketing policies through the Institute or at any meeting (Tr. 28775-76; 29159; 39141; 39148-49; 31949-50; 39165; 39170; 39158; 47663).

In connection with the drafting of the NRA Cement Code there was some discussion of marketing policies to be included in the Code (Tr. 29159). Except for this there never were any discussions of price or marketing policies at Institute meetings attended by Southwestern (Tr. 29159).

The Victorville mill never received statistical reports from the Institute; it never received or used Institute rate books and has always had its own traffic department (Tr. 47669; 47663; 47667).

Southwestern never changed any practice or policy by reason of the Compendium and had no agreement respecting it or the Code of Ethics of the Institute (Tr. 29217-18; 39149-50).

El Paso and Osborn received Institute statistics and used them as a source of general information. Southwestern has had no understanding or agreement regarding its production or shipments. The management of the company was even divided on the proposed plan for sharing business under the NRA Code (Tr. 29160-61; 29206-07; 39146-47; 39148; 29207-08).

Osborn uses Institute rate books. El Paso used them for a time as a check on its own books, but doesn't use them any longer (Tr. 29163; 38950-52; Resp. Exs. 2968-69).

Osborn uses Institute rate books because they are convenient and less expensive than securing the information from the tariffs (Tr. 29163). The Institute rate books are

used by Osborn in billing and in figuring nets at Osborn (Tr. 29360-61; 29367-68). It always uses the correct rate in preference to the rate in the Institute rate books (Tr. 29163-65); does not change its prices just because it is advised of a general rate change but only changes its prices when it learns from the customer trade that there has been a change in prices (Tr. 29165-66). It gets information regarding rate changes direct from the railroads (Tr. 29336). Southwestern has had no agreement to use the Institute rate books (Tr. 39249).

Prior to the Institute, Osborn prepared its own rate books (Tr. 11169-71).

Osborn has had no agreement with competitors regarding conversion tables (Tr. 39249; 39450).

During the time when El Paso used the Institute rate books for checking, if a discrepancy was found El Paso checked the official tariff rate and used that (Tr. 38952).

El Paso keeps its own file of freight rates (Tr. 38892-93; Resp. Ex. 2968). It has used the same conversion table since 1927 (Tr. 38897-98; Resp. Ex. 2969).

17. Exception is taken to the failure to report that Southwestern has not taken any cooperative measures or had any agreement to eliminate diversions (Tr. 29121; 38990-91). Dealers at Osborn have complained to Southwestern against diversions (Tr. 29122) and Osborn doesn't allow a dealer to take delivery at a point where he does not have a place of business. This is done to preserve Southwestern's position in that town and to retain customer good will (Tr. 29123-24).

18. Exception is taken to the failure to report that Southwestern has always been free to vary or change its terms of sale; that it arrives at its terms by independent action; and that it has varied its terms (Tr. 28912; 29125; 29143-44; 29146-47; 38961-63; 47663).

19. Exception is taken to the failure to report that Southwestern has had no agreement or understanding regarding foreign cement. El Paso is the only unit of South-

western that has taken any action regarding foreign cement and that action consisted solely of attempting to persuade its customers not to buy Mexican cement (Tr. 29152; 39131-38; 47669).

Paragraph 67

(*Standard*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Standard Portland Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Standard is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report regarding Standard that in order to save time and at the express invitation of the Trial Examiner (Tr. 38463; 38632; 39018), Standard adopted as its own evidence adduced in behalf of other respondents in lieu of calling a witness. The testimony adopted by Standard was directed at the charges in the complaint, including the subjects reported in Paragraph 67, and expressly met and denied any implication of understanding, agreement or collusion on the part of Standard (Tr. 48105-06).

4. Exception is taken to the failure to report the evidence showing the following general facts regarding the Standard company:

Respondent Standard had no connection with the Standard company that operated a mill at Leeds, Alabama, from 1903 to 1919 (Tr. 38610-12). It is not connected with any

other cement company through stock ownership or otherwise (Com. Ex. 3169 B).

Standard is a small single mill company. Its mill has an annual capacity of about 1,500,000 barrels.. In 1930, the company shipped 1,284,846 barrels, or 85.7% of its mill's capacity. It markets its cement in Ohio and in western Pennsylvania and New York (Com. Exs. 3169 B, F).

Standard has never operated pursuant to any plan for sharing available business. The evidence is that it has never had any agreement with anyone to restrict or limit the production of its mill or to exchange contracts (Tr. 48105-06; 37243; 38691; 40096-98).

5. Exception is taken to the failure to report the following evidence regarding Standard's membership in the Institute:

Standard was not a member of the Institute prior to the official cancellation of the Institute's Code of Ethics (Resp. Exs. 2173 B-C; 2174 C; Tr. 16699; 16927-29).

Standard did not understand that it was expected to use The Cement Institute freight rate books in quoting its prices. The evidence is that Standard had no agreement with anyone regarding use of the Institute rate service (Tr. 48105-06; 37315-16; 38709).

Standard considered the Institute's contract reporting service to be of value to it. The evidence is that the company had no agreement with anyone to cancel contracts (Tr. 48105-06; 37243; 40096-97).

The Institute never influenced or attempted to influence any of the Standard company's policies or practices (Tr. 48105-06; 26136-37; 26208; 26442; 37215-17; 37607-08).

6. Exception is taken to the failure to report that the price bid by Standard on the letting referred to in Com. Ex. 178 A (cited in Paragraph 67 of the Report) had been filed with the NRA Code Authority (Resp. Exs. 811; 1718; 1717). Further exception is taken to the failure to report that Standard's price bid on Com. Ex. 373 A (cited in Paragraph 67 of the Report) was the current commercial market price for cement at the destination involved (Resp. Exs. 1742-43).

7. Exception is taken to the failure to report the following evidence regarding the bidding policies and practices of the Standard company:

Standard has submitted bids to governmental agencies which were not identical with those of other bidders and has also submitted bids f.o.b. mill (Com. Exs. 978 A; 1863; 1864).

The company does not sell cement in any territory in which land grant rates are available to the federal government and has never deprived the government of the benefits of any land grant rates available to it (Tr. 48105-06; 26174).

The evidence is that Standard has never had any agreement with anyone not to bid f.o.b. mill prices (Tr. 48105-06; 37606; 38733).

8. Exception is taken to the failure to report the following evidence regarding Standard's pricing policies:

Standard meets competitive prices as it finds them in the field. It secures its information with regard to the prices its competitors are quoting from its salesmen, who operate under instructions to report all evidences of competitive activity they find in making their rounds of the company's customers, and direct from its dealer and contractor customers. The company has no other sources of information with regard to prices. It has never received price information from its competitors nor has it ever sent any information regarding prices to its competitors (Tr. 48105-06; 38703; 38742-44).

The company has at times quoted prices lower than those currently being quoted by its competitors (Tr. 11340-41).

The Cement Institute has never had anything to do with Standard's method of quoting prices. The evidence is that the company has never had any agreement with anyone to quote identical prices or to quote prices which reflect price bases or to maintain any particular price level (Tr. 48105-06; 26136-37; 26442; 33985-86; 37605-06; 26316-17; 26196).

9. Exception is taken to the failure to report the evidence showing that Standard had no agreement with anyone regarding any of its policies and practices with regard to the trucking of cement, diversions, and terms and conditions of sale, or with regard to its contract forms (Tr. 48105-06; 37606-07; 38720; 39509-10; 39707). Exception is further taken to the failure to report that The Cement Institute has never influenced or attempted to influence Standard with respect to any of these matters (Tr. 48105-06; 26136-37; 26442).

10. Exception is taken to the citation of Resp. Ex. 1262 A in connection with dealer policies of the Standard company because it has no relation thereto. Further exception is taken to the citation of Resp. Ex. 1752 in the same connection because that exhibit was never received in evidence. Exception is further taken to the failure to report the following evidence regarding Standard's dealer policies and practices:

Standard's customers pay freight for the company's account. The company handles claims of customers for loss or damage to its cement in transit (Resp. Ex. 1262 B).

Neither The Cement Institute nor any dealer association has had anything to do with the question of whether or not Standard would sell its cement to a person as a dealer; nor has any competitor influenced the company in this regard. The evidence is that Standard has never had any agreement as to who should or who should not be considered to be a dealer (Tr. 48105-06; 32315; 26208; 37215-17).

The Cement Institute has never had anything to do with Standard's policy regarding the classes of customers to whom it will sell its cement. The evidence is that Standard has never had any agreement with anyone with regard to classes of customers to whom to sell cement (Tr. 48105-06; 26136-37; 37606-07).

11. Exception is taken to the failure to report that at no point in the area in which it markets its cement does the Standard company come into competition with imported cement (Tr. 48105-06; 29604).

Paragraph 68

(Superior Cement Corporation)[*]

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Superior Cement Corporation is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Superior is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 68 that the acts and practices of Superior were adopted or used pursuant to agreement or understanding with any other respondent. Exception is further taken to the failure to report that the President and the Secretary-Treasurer of Superior appeared as witnesses and testified fully regarding the practices and policies of the company, including those reported in Paragraph 68; and that this testimony showed that Superior's policies and practices were developed and used independently and without understanding or agreement with anyone (Tr. 29549-686; 29686-836).

4. Exception is taken to the failure to report the following evidence regarding Superior Cement Corporation generally:

Superior is not affiliated or connected with the Superior Portland Cement Company, Inc., or with any other cement company (Tr. 29550).

[*] To avoid confusion, Superior Cement Corporation is referred to throughout these exceptions as "Superior"; and Superior Portland Cement Company, Inc., is referred to as "Superior, Inc."

Superior is a small company with one modern and efficient mill having an annual capacity of about 1,000,000 barrels. Its mill is located in southern Ohio and the company markets its cement in the southern part of that state, in West Virginia, in eastern Kentucky and southeastern Indiana and, to a small extent, in parts of western Pennsylvania (Tr. 29570; 29586; 29597). As the result of severe competition, Superior's sales costs have steadily increased (Tr. 29610-13).

The evidence is that Superior has not had any agreement with anyone to divide up marketing areas or to allocate business (Tr. 29589).

5. Exception is taken to the failure to report that the price Superior bid on the letting referred to in Com. Ex. 178 A (cited in Paragraph 68) was the price on file with the NRA Code Authority for the cement industry (Resp. Exs. 811; 1717-18). Exception is further taken to the failure to report that the price Superior bid on the letting referred to in Com. Ex. 373 A (cited in Paragraph 68) was the current market price at the destination at which the government requested bids (Resp. Exs. 1742-43).

6. Exception is taken to the failure to report that the evidence is that Superior has never had any agreement concerning its policies or practices with regard to its bids to governmental agencies (Tr. 29598).

7. Exception is taken to the failure to report the following evidence regarding pricing policies and practices of the Superior company.

The company sells its cement at delivered prices and considers that in selling cement to any particular customer, its price is the delivered price it charges. The company has never received requests from any of its commercial customers for prices other than on a delivered basis. The only price information Superior supplies to each of its salesmen is a list of the delivered prices it is currently quoting in the particular salesman's territory (Tr. 29596; 29614; 29688). Further evidence regarding price information the company furnishes to its salesmen was rejected by the Trial Examiner (Resp. Ex. 1854 for id.).

The company takes care of claims for loss of or damage to its cement in transit to the customer (Resp. Ex. 1850 C).

It is Superior's general practice to follow the prices it finds its competitors quoting in the field. It learns what these prices are from its customers (Tr. 29590-91).

On at least one occasion, Superior has exercised price leadership. On that occasion, Superior increased all of the prices it was quoting by a uniform amount (Resp. Exs. 1850 A-C; Tr. 29557-58; 29568-69; 29571; 29620). Further testimony by the President of the company with regard to the company's initiation of price changes was stricken by the Examiner (Tr. 29559-65; 29575-81; 29667-69).

Superior has always been free to change its pricing or marketing policies and practices at any time. The evidence is that the company has never had any agreement to be either a price leader or a price follower (Tr. 29558; 29582-83; 29664-65).

Although it is Superior's general practice to meet the lowest prices it finds being quoted by its competitors, it has often "gone a little lower than our competitors" at given destinations. It has been the company's experience that these concessions on its part do not generally result in an increased volume of business. It has found rather that while it might make the particular sale, it loses other business (Tr. 29591-93; 29616; 29812). The company has also found that dealers who normally buy cement from one producer cannot be taken away merely by the offer of a lower price. Such dealers report the lower offer to the producer from whom they normally buy, thus giving him an opportunity to meet the lower price (Tr. 29617). Superior has learned that many of its competitors make price concessions (Tr. 29593-94).

The evidence is that Superior has never had any agreement with anyone to sell its cement on a delivered basis or to follow any of the marketing or pricing methods it uses (Tr. 29558; 29582-83; 29597-98; 29634-35).

8. Exception is taken to the failure to report the following evidence regarding Superior's policies toward trucking:

The company did a small amount of trucking at one time but found that it was not economically sound beyond distances of 35 or 40 miles from the mill. Within such areas, there are virtually no markets (Tr. 29601-02).

During the period that Superior delivered cement to trucks at its mill, many of its dealer customers complained about the practice and asked the company to discontinue it. None of Superior's competitors ever exerted any pressure on the company to discontinue trucking. The evidence is that it had no agreement with anyone to discontinue trucking (Tr. 29602-03).

9. Exception is taken to the failure to report the following evidence regarding Superior's dealer policies:

The company's dealer customers are the most important outlet for its product (Tr. 29598). On choosing its dealer customers, Superior tries to choose those best equipped to handle retail sales in their particular communities. In making this selection it is immaterial to the company whether the prospective dealer can buy cement from any of its competitors or whether he is a member of a dealer association (Tr. 29599-600). The evidence is that Superior has had no agreements with anyone regarding recognition of dealers (Tr. 29600-01). Evidence that Superior ships cement to dealers at points where they have no warehouses was rejected by the Examiner (Resp. Ex. 3116 A for id.).

The evidence is that Superior has had no agreement with anyone to follow any particular policy regarding the classes of customers to whom it will sell its cement or the method it will employ in selling its product (Tr. 29558; 29601; 29650-53).

Superior makes some of its sales direct to W.P.A. (Resp. Exs. 2317-18; Tr. 29601; 29649-50). Further evidence regarding Superior's practice with reference to W.P.A. sales was rejected by the Examiner (Resp. Exs. 1886-87 for id.; 1889 for id.).

10. Exception is taken to the citation of Tr. 9151 in Paragraph 68 in connection with "meetings" because it has no bearing on Superior.

11. Exception is taken to the failure to report that in no part of the area in which Superior markets its cement does it come into competition with imported cement and the evidence is that Superior has never had any agreement with respect to foreign cement competition (Tr. 29604).

Paragraph 70

(Three Forks)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Three Forks Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Three Forks is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the implication in Paragraph 72 that the practices and policies of Three Forks conform to or are inter-related with the practices and policies of Arkansas, Colorado, Nebraska, Oklahoma and Union, or any of them, and to the failure to report the evidence showing: that the policies and practices of Three Forks have been formulated independently of the policies and practices of the other Ideal affiliates; that there has been no arrangement whereby the prices or commercial practices of each of the companies is maintained on the same basis; and that none of the named companies has had anything to do with the determination of matters of policy or practice of any other company (Tr. 13889-90; 41967-68; 42117-18; 46441-42).

4. Exception is taken to any implication in Paragraph 70 that the policies and practices of Three Folks have been adopted or carried on as the result of understanding or agreement with any respondent on the ground that it is not supported by the evidence. Exception is further taken to the failure to report the testimony of the sales manager of Three Forks showing that none of its policies and practices were adopted or used as the result of understanding or agreement with any competitor (Tr. 47642-43).

5. Exception is taken to the failure to report the following evidence with respect to the Three Forks company generally:

The Trident mill is a small one, its annual capacity being about 792,000 barrels (Com. Ex. 3176 TT). The company sells in an area comprising Montana, western North Dakota and northwestern Wyoming with occasional sales in South Dakota and Idaho. The company sells in competition only with companies doing business in that area, chiefly the following: Spokane, Lehigh, Washington-Idaho Lime Products, Idaho, Monolith Midwest, South Dakota, Northwestern States, Universal Atlas and Huron (Tr. 47642).

6. Exception is taken to the failure to report the following evidence with respect to Three Forks' membership in The Cement Institute: Three Forks did not become a member of the Institute until after the Institute Code of Ethics was cancelled (Resp. Exs. 2173 B-C; 2174 C; Tr. 16699; 16927-29; see also Exception No. 7 to Paragraph 1, *supra*). It resigned from the Institute on February 28, 1936 and did not resume membership until early in February 1937, when it withdrew its resignation (Resp. Ex. 127 C; Com. Exs. 561, p. 10; 1033 C). Three Forks has never participated in any of the statistical services of the Institute (Com. Ex. 595 C; Tr. 2809; 16710-11) and does not receive or use any freight rate books published by The Cement Institute (Tr. 3154-56; 16852-53; Com. Exs. 595 D-E).

7. Exception is taken to the failure to report the following evidence with respect to bids of the Three Forks Company:

The bids of May 10, 1934 and June 5, 1934, referred to in Paragraph 70 were taken during the effective period of price filing provisions of the NRA Cement Code. Prices bid on these lettings were filed with the Code Authority by Three Forks and others pursuant to the provisions of the NRA Cement Code and Three Forks bid prices as filed (Com. Exs. 557, pp. 336-37; 164 A-B, D, i, J).

Three Forks has submitted bids which were not identical with those of its competitors and has bid f.o.b. mill to the federal government (Com. Ex. 169; Resp. Exs. 384 A; 3692; Tr. 10252; Com. Exs. 165; 166; 168; Resp. Exs. 384 A; 3692; Tr. 10252). Further evidence to this effect was rejected by the Examiner (Resp. Exs. 3660-Z25; Tr. 47700-04). The aforementioned bids and those reported in Paragraph 70 are the only bids of the Three Forks company in evidence.

The evidence shows that Three Forks has never at any time agreed with any competitor to make the same bid for any public contract (Tr. 47643).

8. Exception is taken to the statement in Paragraph 70, "See also: as to pricing, dealer policies, trucking, etc., Arkansas, and others of the Boettcher chain", because it erroneously implies without support in the evidence that material in the paragraphs of the report relating to other companies in the so-called Ideal group of mills applies also to the Three Forks company (See Exception No. 3, *supra*). Exception is further taken to the failure to report the following evidence regarding the practices and policies of the Three Forks company:

There is no evidence in the record concerning Three Forks' policies, if any, with regard to trucking, diversions of cement, terms of sale, imported cement, land grant rates or standardization of product.

About 80 per cent of the sales of Three Forks, by volume, are made to dealers having retail outlets. The rest is sold to agencies of the federal and state governments, to railroads, and to large mining and power companies (Tr. 47642).

The testimony on behalf of Three Forks shows that it has never at any time agreed with any competitor to use or employ any particular system or method of pricing or marketing, nor has it ever at any time agreed with any competitor to quote the same price as such competitor for cement, at any place, or to any customer (Tr. 47642-43).

9. Com. Exs. 2242-47 (cited as pertaining to meetings involving Three Forks) show on their face that Three Forks was in no way involved in any of the matters referred to therein. Further exception is taken to the failure to report the evidence showing that no action ever was taken on the proposals referred to in Com. Exs. 2242-47, and that no agreement, understanding or collusion resulted therefrom (Com. Exs. 1125 D-F; 3176 X; 976 4J; see also Exception No. 5 to Paragraph 178, *infra*). Further exception is taken to the failure to report that there is no evidence that Three Forks has participated in any meetings.

Paragraph 71

(*Trinity*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Trinity Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Trinity is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication in Paragraph 71 or elsewhere in the Report that the practices and policies

of Trinity Portland Cement Company have been adopted or carried on as the result of understanding or agreement with any other respondent on the ground that there is no evidence to support it. Exception is further taken to the failure to report that responsible executives of Trinity appeared as witnesses and showed that the company has had no such agreement or understanding (Tr. 47569, *et seq.*; 13321, *et seq.*).

4. Exception is taken to the failure to report that Trinity markets cement only in Texas, Louisiana, Oklahoma, Arkansas and parts of Mississippi, in addition to exporting some cement to Panama, Venezuela and Puerto Rico. Accordingly the company comes into competition only with the limited number of respondents who do business in that area (Tr. 47583-86).

Evidence showing that in recent years Trinity has made renewals and improvements in its mills other than repairs was rejected by the Examiner (Tr. 47581).

5. Exception is taken to the failure to report that Trinity joined the Institute in June, 1933 in order to participate in the emergency NRA legislation (Tr. 13371-72).

6. Exception is taken to the inadequate and misleading reference to the pricing methods of Trinity and to the failure to report the testimony relating thereto including the following:

Trinity's policy is to offer its cement delivered on terms and conditions that are either as favorable or more favorable than other cements at the same place and at the same time. Many of the prices quoted by Trinity are determined by adding the applicable freight rate to a base at its own mill, but when such prices are higher than prices quoted by any competitor, Trinity then must and does meet such lower prices (Tr. 47614-16). Information regarding competitors' prices is obtained from the field. The company's salesmen are furnished with lists of the company's prices at all destinations where they sell (Tr. 47586-88). The company has not always adhered to its published commercial prices (Tr. 47611-14; 47590-91).

In attempting to meet competitive prices at destinations Trinity never has any assurance that its own price will be as low as the lowest quoted by any competitor. It can only tell by the subsequent daily checking of its sales force and advice from customers (Tr. 47617-18). The company sells in areas where prices do not reflect any base figure. Moreover, the patterns of prices which do appear in parts of its sales area vary from time to time (Tr. 47615).

7. Exception is taken to the failure to report the following evidence regarding bids of Trinity to governmental bodies:

The company has bid prices to the federal and state governments which were not identical with bids of competitors (Com. Exs. 121 C; 314 W; Resp. Exs. 3783 A-B), and has submitted f.o.b. mill prices to the federal government when such bids have been requested (Tr. 47591-92; Com. Exs. 170 A-B; 776; 781; 784; 792).

The "control clause" was originated by the Signal Mountain Company and Trinity has continued to use the "control clause" since the Code, although most of its competitors have discontinued it (Tr. 47592-93; see also exceptions to Paragraphs 130-138, *infra*). Further evidence was rejected by the Examiner (Resp. Ex. 3434 A for id.).

8. Exception is taken to the failure to report that the price bid by Trinity on Com. Ex. 180 (cited in Paragraph 71) was the current commercial price at Monroe, La. and that the land grant rates available to the government were furnished on request by the railroads (Resp. Exs. 859; 897; 2284 A; 3046 B; Tr. 31894-95).

9. Exception is taken to the failure of the Trial Examiner to report that Trinity initiated the practice of prepaying freight on all commercial sales in the area where it sells (Tr. 42246). Further evidence was rejected by the Examiner (Resp. Exs. 3430 A-J for id.; Tr. 42195).

10. Exception is taken to reference to Com. Ex. 1131 J and Com. Ex. 3005 A since they do not relate to the respondent Trinity.

11. Exception is taken to the failure to report that Com. Ex. 2369 (cited in Paragraph 71) differs from marketing policies of the other respondents.

12. Com. Ex. 867 has no connection with Trinity.

Paragraph 72

(*Union*).

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9 that Union Portland Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully reported and referred to in the minutes. There is no evidence to support such implication and none is cited (See further below regarding The Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Union is "identified" or connected with "group activities" or industry policies or practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the implication in Paragraph 72 that the practices and policies of Union conform to or are interrelated with the practices and policies of Arkansas, Colorado, Oklahoma, Nebraska and Three Forks, or any of them, and to the failure to report the evidence showing that the policies and practices of Union have been formulated independently of the policies and practices of the other Ideal affiliates; that there has been no arrangement whereby the prices or commercial practices of each of the companies is maintained on the same basis; and that none of the named companies has had anything to do with the determination of matters of policy or practice of any other company (Tr. 13889-90; 41967-68; 42117-18; 46441-42).

4. Exception is taken to any implication in Paragraph 72 that the policies and practices of Union have been

adopted or carried on as the result of understanding or agreement with any respondent on the ground that it is not supported by the evidence. Exception is taken to the failure to report that the testimony of the sales manager of Union showed that none of the policies and practices of Union were adopted or used as the result of understanding or agreement with any competitor (Tr. 47646).

5. Exception is taken to the failure to report the following evidence with respect to the Union Company generally:

The Devil's Slide mill is a small one with a capacity of about 750,000 barrels a year (Com. Ex. 3176 TT). Union markets the product of this mill in an area comprising eastern Nevada, southwestern Idaho and Utah. It sells in competition only with companies doing business in that area, chiefly the following: Idaho, Oregon, Portland of Utah, Monolith Midwest, Calaveras, Cowell, Pacific, Santa Cruz, Yosemite, Monolith, California, Southwestern and Riverside (Tr. 47645-46).

6. Exception is taken to the failure to report the following evidence with respect to Union's membership in The Cement Institute:

Union did not become a member of The Cement Institute until after the Institute's Code of Ethics had been officially cancelled (Resp. Exs. 2173 B-C; 2174 C; Tr. 16699; 16927-29; see also Exception No. 7 to Paragraph 1, *supra*). It resigned from the Institute on February 28, 1936 and was not a member again until February 1937 when it withdrew its resignation (Resp. Ex. 127 C; Com. Exs. 561; p. 10, 1033 C).

Union has never participated in any of the statistical services of The Cement Institute (Com. Ex. 595 C; Tr. 2809; 16710-11) and it has never received or used any freight rate books published by The Cement Institute. The Institute never published freight rate books for the states in which Union sells cement (Tr. 3154-56; 16852-53; Com. Exs. 595 D-E).

7. Exception is taken to the misleading statement in Paragraph 72 that Union was "involved in identical bidding" because it erroneously implies that Union submitted

sealed bids to governmental authorities which were identical with bids of competitors. The invoices referred to in Paragraph 72 are invoices on cement sold to dealers at commercial prices in all instances. Exception is further taken to the failure to report the following: There is no evidence that Union ever submitted a bid on federal or state government work that was identical with that of any other bidder, and the only evidence on the subject shows that Union's bids on federal government work have not been identical with those submitted by other bidders (Com. Exs. 1328-30; 134 C, F-G; 3261 N; Resp. Exs. 290 A-H; Com. Ex. 135 B; Resp. Exs. 292 A-M; 3785; Tr. 10263; Resp. Exs. 384 A; 3692; 384 B; 3692; Tr. 10269; Resp. Exs. 384 C; 3692; Tr. 10273-74).

The evidence shows further that Union has never at any time agreed with any competitor to quote the same price as such competitor for cement at any place or to any customer (Tr. 47646).

Union has also submitted f.o.b. mill bids to the federal government as follows: Com. Exs. 1328-30; 134 C, F-G; 3261 N; Resp. Exs. 290 A-H; Com. Ex. 135 B; Resp. Exs. 292 A-M; 3785; Tr. 10263; Resp. Exs. 384 A; 3692; 384 B; Tr. 10269; Resp. Ex. 384 C; Tr. 10273-74. Further evidence of such bids was rejected by the Examiner (Resp. Exs. 3660 A, B, D for id.; Tr. 47700-04).

8. Exception is taken to the statement that Union made a joint bid with five others on the Boulder Canyon project on the ground that it is contrary to Com. Ex. 134 C cited, and to all the evidence. Further exception is taken to the failure to report the following with respect to the Boulder Canyon bids: Com. Ex. 134 C, which is a tabulation of bids taken on March 26, 1934 for Boulder Dam requirements, indicates that bids were submitted by Riverside, California, Southwestern, Monolith, Calaveras and Union. Com. Exs. 134 D-E shows that Riverside, California, Southwestern and Monolith submitted a joint bid of $1.49 f.o.b. Crestmore, Colton, Victorville or Monolith and that this quotation was net. This price was filed with the NRA Code Authority which in turn advised the bidders (Com. Exs. 133 A-B). Com. Exs. 134 F-G shows that Union submitted an indi-

yidual f.o.b. mill bid of $1.2644 f.o.b. Devil's Slide and that this quotation was net. Com. Ex. 134 C indicates that Calaveras submitted a bid f.o.b. its mill at Kentucky House on 200,000 barrels of cement at a total figure of $310,000 or $1.55 per barrel, and that this quotation was subject to a discount of 10¢ per barrel for payment within 15 days.

9. Exception is taken to the inference that matters pertaining to "Arkansas and others of the Boettcher chain" with respect to "pricing, trucking, etc." are applicable to Union because this is not supported by the evidence (See Exception No. 3, *supra*). Further exception is taken to the failure to report the following evidence:

Union sells cement to agencies of the federal and state governments, to railroads, to large mining and power companies, to contractors, and to dealers having retail outlets. Approximately 60% of Union's sales, by volume, are made to dealers (Tr. 47646). The testimony of its sales manager shows that the company has never at any time agreed with any competitor to use or employ any particular method of pricing or marketing its cement (Tr. 47646).

10. Exception is taken to the failure to report that there is no evidence with regard to Union's attitude toward trucking or that the company took any attitude on this subject.

11. Com. Exs. 2242-47 cited in connection with meetings involving Union show on their face that Union was in no way involved in the matters referred to therein. Further exception is taken to the failure to report the evidence showing that no action ever was taken on the proposals referred to in Com. Exs. 2242-47, and that no agreement, understanding or collusion resulted therefrom (Com. Exs. 1125 D-F; 3176 X; 976 4J; see also Exception No. 5 to Paragraph 178, *infra*).

Paragraph 74

(Valley Forge)

1. Exception is taken to any implication suggested by Paragraph 82 and the footnote to page 9, that Valley Forge Cement Company is "identified" or connected by the evidence in any way with The Cement Institute. There is no evidence to support such implication and none is cited. Com. Ex. 1033 D, cited in Paragraph 74, is contrary to all the evidence showing that Valley Forge is not and has never been a member of The Cement Institute; that it was never invited to join The Cement Institute; that it did not apply and was never elected to membership in the Institute; that it has never been represented at any meeting of The Cement Institute; and never received any service of The Cement Institute (See: Commission's and Respondent's Exhibits constituting complete file of the minutes and reports of all Cement Institute meetings and activities; Valley Forge Answer; and Com. Exs. 153 A; 139 S; 1033 A-B; Resp. Exs. 2417 B; 143 D).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Valley Forge is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report the following evidence relating to the organization and operation of Valley Forge:

Valley Forge owns and operates one cement plant at West Conshohocken, Pa., where it is engaged solely in the manufacture of Portland cement. It has never sold any of its products in interstate commerce but the entire output has always been sold at the door of its plant to an independent cement manufacturer, the Allentown Portland Cement Company, which is not a respondent in this proceeding. Valley Forge has never marketed cement and has not engaged in trade or commerce. It has never had any sales policy nor used any of the methods or practices or engaged in any of the activities set forth in the complaint

(See Valley Forge Answer; Com. Exs. 3138 A-C; Tr. 10520-22).

4. Exception is taken to the statement in Paragraph 74 that Allentown Portland Cement Company is the "selling agency for Valley Forge" because there is no evidence to support it. Allentown Portland Cement Company is not a respondent, and its activities, policies or practices are not the subject of this proceeding.

5. There are no exhibits marked Com. Ex. 135 i and Resp. Exs. 3235-Z82, both cited in Paragraph 74.

Com. Ex. 385 A; Resp. Ex. 1353 and Tr. pp. 25045-48 and 27049-54 cited in Paragraph 74 do not in any way relate to the subjects for which they are cited.

Paragraph 75

(*Volunteer*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Volunteer Portland Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to Page 9 that Volunteer is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that in addition to the sales manager of Volunteer, who was called as a witness by government counsel, Volunteer called as its own witnesses the President, the General Manager and the Traffic Manager of the company (Tr. 31361, *et seq.*; 31710, *et seq.*; 38605, *et seq.*); that the testimony and ex-

hibits offered through these witnesses thoroughly explained the development and use of Volunteer's various practices and policies at issue, and showed that the company has not had any understanding or agreement with any respondent regarding them (See more specifically below).

4. Exception is taken to the failure to report regarding the location of Volunteer's mill, the evidence showing that the site was selected without consideration of the so-called basing point method or any other method of pricing, but because of the availability of raw materials, fuel and power and the accessibility of attractive markets (Tr. 38625-26; 31380-81). Further evidence showing other matters considered in connection with the location of the Volunteer plant was rejected by the Examiner (Tr. 38624-25).

5. Exception is taken to the inadequate report on the evidence relating to the pricing policy and practices of Volunteer, and to the failure to report the following:

Volunteer is and always has been a price follower, *i. e.*, it meets prices quoted by competitors as it finds them in the field. The company quotes prices without regard to any "basing point system" or method (Tr. 5008-09; 5032-33; 5208; 5228; 5233; 31713; 38636; 38675-76). Further evidence regarding its pricing practices was rejected by the Examiner (Tr. 38631-32).

It secures its information with regard to the prices its competitors are currently quoting from its customers and from its salesmen who operate in the field under instructions to report all new competitive prices and activity to the home office. Volunteer has no other sources of competitive price information (Tr. 5115; 31713-14; 31724-28; Resp. Exs. 2212-17).

Volunteer keeps up to date a card index file showing Volunteer's current prices for every town in the company's marketing area having a population of 500 or over. The company uses the prices appearing on these cards in its day to day business. The prices it filed with the Code Authority at the outset of Code price filing were taken therefrom. All new information with regard to competitive prices is checked against this card index (Tr. 31719-20; 31730-33; 31865-66; Resp. Exs. 2219-20).

The company's only source of information with regard to price bases is its analysis of destination prices of competitors reported from the field. It has never received price base information from any of its competitors or from The Cement Institute (Tr. 5128; 5129-32).

Volunteer filed prices under the NRA Code, but ceased doing so immediately after the *Schechter* decision (Tr. 5133-34).

Volunteer considers its price to be the amount its customer must pay (Tr. 5207).

The evidence shows that Volunteer has never had any understanding or agreement to use any particular method of pricing or to quote any particular prices (Tr. 5231; 38636).

At one time Volunteer attempted to obtain more business in Knoxville by selling at prices lower than the lowest prices it found there but this attempt was a failure because competitors immediately met Volunteer's lower prices (Tr. 31477; 33004-08; 38634-35).

6. Exception is taken to the failure to report the following evidence regarding the bids and bidding practices of Volunteer:

Volunteer's bids and methods used to determine its bid prices were explained and described at length by witnesses who personally prepared the bids. The testimony of these witnesses together with the contemporaneous files of the company, showed that Volunteer's bids were determined independently, without communication or agreement with any other respondent (Tr. 31792-907; 31431-32; 31450-60; 31472-77 and Resp. Exs. introduced during this testimony).

Most invitations by government agencies call for delivered prices (Com. Ex. 1099 C; Resp. Exs. 2280 A-K; Com. Ex. 1099 D; Resp. Exs. 2282 A-J; Com. Exs. 401-02; 9; 10). On the occasions where f.o.b. mill prices were invited before the period of NRA, Volunteer responded with such prices without any "control clause" or other qualifying clause (Com. Exs. 789; 397). The company used the "control clause" on some of its bids after 1934, having learned of it through a Code filing on one of the T.V.A. bids in 1934. Its adoption and use of this clause was an indepen-

dent effort to meet competition (Tr. 31847; 31902; Com. Exs. 156-57; 180; 314 Q; 1073 E-G; 1084-85; 1087-88; 1091; 1094; 1096; Resp. Exs. 2285; 2287). In every case where f.o.b. mill bids were requested, the government was able to buy the cement f.o.b. Volunteer's mill at a mill price (See exceptions to Paragraphs 130-38, *infra*).

The land grant rate information used by Volunteer in preparing bids to the United States Government has always been obtained from railroads and various governmental sources (Tr. 31792-848; Resp. Exs. 2246-52). The Examiner rejected further evidence showing this (Resp. Exs. 2253-55 Z33 for id.).

7. Exception is taken to the failure to report regarding Com. Ex. 180 A (cited in Paragraph 75) that the witness who prepared Volunteer's bid on this letting testified that he personally secured the land grant rates used in connection with the bid from the Louisville & Nashville Railroad, and explained the independent manner in which Volunteer determined its bid (Tr. 31894-95; Resp. Ex. 2284 A).

8. Exception is taken to the failure to report regarding Com. Exs. 1090 and 1096 A (cited in Paragraph 75) that the witness who prepared these bids for Volunteer described the independent manner in which the bids were determined and showed the sources from which the land grant rates available to the government were obtained (Tr. 31904-05; 31894-904).

9. Exception is taken to the failure to report the following evidence adduced by Volunteer regarding the negotiations with and bids to TVA:

Volunteer quoted prices lower than its commercial prices both on the TVA letting of March 19, 1934, and on that of October 15, 1934 (see below).

On the letting of March 19, 1934, Volunteer quoted a price of $1.75 f.o.b. its mill subject to a ten cent discount. It had previously filed this f.o.b. mill price with the NRA Code Authority for the cement industry. This mill price was not accompanied by any "control clause" or other clause which might be taken to have qualified the bid. If the then existing commercial freight rate were added to

this mill price, the cost to TVA at Norris Dam would have been over 12¢ lower than Volunteer's current price at that point if TVA decided to ship by rail. Volunteer received an award under its bid and before any shipments were made, TVA was given a special reduction in the freight rate to the Dam which made its cost at Norris Dam over 23¢ lower than Volunteer's commercial price at that point (Com. Ex. 397; Resp. Exs. 2191 A-12Z; 2192 B-C; Tr. 31450-55; 31457-58; 31656-57; 38662).

Volunteer quoted its f.o.b. mill price so as to give TVA this price concession because of the size of the project and the proximity of the Volunteer mill to it. The concession was given despite the fact that the invitation called for a type of cement that Volunteer had never before manufactured and that required changes in Volunteer's manufacturing process. At the time of its bid, Volunteer estimated that the cost to it of making the type of cement called for would run from 7¢ to 10¢ more per barrel than the cost of manufacturing standard cement (Tr. 31431-33; 31472; 38662).

The Trial Examiner struck from the record or rejected further evidence which showed other additional costs incurred by Volunteer traceable to the type of cement called for by the invitation (Tr. 31433-50; Resp. Ex. 2190).

After receiving an award on the letting of March 1934, Volunteer permitted TVA to take delivery of cement at the Volunteer mill by truck even though the invitation and the contract called for deliveries f.o.b. car. This courtesy represented an additional expense and considerable inconvenience to Volunteer because its plant was not equipped with proper facilities for truck loading (Tr. 31458-59; 31460-65; 31471-72; Resp. Exs. 2192 B-D).

The evidence shows that Volunteer had no contact, agreement or understanding with any of its competitors with regard to the price it filed and bid on the TVA letting of March 1934 (Tr. 31656-57; 38662-63).

Subsequent to the March 1934 letting, representatives of Volunteer participated in negotiations with Dr. Morgan and other TVA representatives. These had started out in July 1934 as an inquiry into what a fair price for TVA cement would be. Thereafter, at Dr. Morgan's instance,

the inquiry turned to what a price competitive with a proposed TVA plant would be (Tr. 31639-40).

The Examiner struck from the record evidence showing that TVA turned over to Volunteer a cost estimate totalling $1.26 per barrel f.o.b. mill as its idea of what a fair price should be; that this estimate purported to be based on Price, Waterhouse figures for 1928-1932 which did not take into account increased costs brought about by compliance with NRA; that Volunteer, for purposes of comparison with the TVA estimate, made a detailed estimate showing its cost of producing cement based on actual operations to be $1.50 per barrel, prior to the substantially increased costs which were brought about by NRA; and that Volunteer was in the first five or ten of the fifteen lowest cost mills included in the Price, Waterhouse, figures used by TVA (Tr. 31478-504; 31515-34; 31528-38; 31637-38; 31647-48; 32959-60; Resp. Exs. 2194 A-B; 2195).

The Examiner also struck from the record the evidence of C. F. Lewis, general manager of Volunteer, which explained his part in the discussions with TVA and demonstrated that all of TVA's cost and other estimates were erroneous (Tr. 31536-649; 31657-64).

The evidence received also shows the following: During the course of the negotiations, Volunteer turned all of its books over to TVA (Tr. 38670-72). Volunteer bid prices on the TVA letting of October 15, 1934 that were in accordance with the formula laid down by Dr. Morgan. These prices did not arise from the negotiations to discover a "fair price" but were in the form of an arbitrary ultimatum by TVA (Tr. 31664-68; Resp. Exs. 2206 A-Z26).

The Trial Examiner struck from the record evidence showing that these prices were not based on what TVA could have made and furnished its own cement for but were lower (Tr. 31668-69).

Volunteer was awarded about one and one-half million barrels on the October 1934 letting but from 1934 to 1939 it had shipped only a total of 730,000 barrels and all of this was on Hiwassee and Norris Dams. During 1936 TVA ordered only a few shipments and during 1937 ordered none at all. During the negotiations, TVA had estimated

Hiwassee requirements at 1,200,000 barrels. The actual amount used was considerably less and of the amount actually taken, Volunteer shipped about 25% (Tr. 31670-74).

The Examiner struck evidence showing that the amount actually used on the Hiwassee Dam was 780,000 barrels (Tr. 31676).

On the October letting Volunteer did not bid on the "down river" dams because its return would have been too low (Tr. 31698).

See also exceptions to Paragraphs 189 and 190, *infra*, and Exception No. 6 to Paragraph 57, *supra*.

10. Exception is taken to the portion of Paragraph 75 relating to Volunteer's membership in The Cement Institute on the ground that it does not adequately report the evidence regarding that subject. Exception is further taken to the failure to report the following evidence.

Volunteer joined The Cement Institute in 1929 only after the directors of the company were advised by their attorney that the Institute Articles of Association contained nothing illegal. When it joined The Cement Institute, Volunteer conditioned its acceptance of the Code of Ethics only upon its approval by the Federal Trade Commission (Resp. Exs. 2928-29; Tr. 38649-52). Volunteer resigned from The Cement Institute on December 1, 1930, for reasons of economy made necessary by the depression (Tr. 38652-53). Volunteer rejoined The Cement Institute in 1933 in order to increase the probability of governmental approval of the NRA Cement Code (Resp. Exs. 2930-31; Tr. 38653-56). After the *Schechter* decision, Volunteer continued to market cement substantially as it had under the NRA Code in an effort to comply with requests by high administration officials that manufacturers voluntarily follow the practices they were using before the Codes were invalidated (Resp. Ex. 2932; Tr. 38657-59). The company ceased filing prices, however, immediately after the *Schechter* decision (Tr. 5134).

Volunteer has continued its membership in the Institute since 1936 primarily to obtain the benefits of the Institute freight rate service (Resp. Exs. 2933 A-B; Tr. 38660-62).

Volunteer secures the freight rate information it requires in its business from The Cement Institute freight

rate books. It uses this freight rate information in analyzing delivered prices of competitors, in anticipating prices, in determining whether it can afford to take a particular piece of business, and in shipping cement (Tr. 5017; 5023-24; 5135-36; 5228-29; 31717; 31745-46). Volunteer finds the Institute rate books adequate for its purposes in shipping cement (Tr. 31755-60; 31762-69).

Volunteer uses Institute rate books for reasons of convenience and economy. For a period of two years after it had resigned from the Institute in 1930 (see *supra*), Volunteer depended upon official tariffs for its freight rate information and did not use the Institute books. The company found that this made no difference in its ability to meet competition and quote prices but that additional rate clerks were necessary and that a much greater length of time was consumed in looking up required rate information than had previously been needed. When it rejoined the Institute, therefore, Volunteer decided, in the interests of economy, to resume its use of the Institute books. The Institute service costs the company between $200 and $300 a year and has resulted in a considerable monetary saving (Tr. 5025; 5135-36; 5229; 5241; 31745; 31762; 31773-75; 31848-65; Resp. Exs. 2256 A-B; 2257).

When Volunteer finds an error in the Institute book, it always uses the correct rate regardless of whether or not it has received an Institute correction notice (Tr. 5025-26; 5031; 31754).

The evidence shows that Volunteer has never had any agreement or understanding with regard to use of the Institute rate books (Tr. 5231).

The President of Volunteer testified that when his company joined The Cement Institute it was not intended that the Institute should interfere with or "police" Volunteer's prices and practices and that the Institute has never done so (Tr. 38652).

11. Exception is taken to the failure to report regarding "meetings", that Volunteer has not been represented at any meetings with competitors other than those of the Institute, except the one referred to in Com. Ex. 1131 J, cited in Paragraph 75, and to the further failure to re-

port that the meeting referred to therein was a conference called by Mr. Lamont as Secretary of Commerce.

12. Exception is taken to the phrase "as to trucking, Com. Exs. 976-10i; 971-14B"; because the statement and the citations accompanying it represent an inadequate and misleading report on the evidence relating to Volunteer's trucking policies and practices. Exception is further taken to the failure to report the following evidence relating thereto:

Volunteer has frequently permitted deliveries to customers' trucks at the mill with full freight allowances (Tr. 33002; Com. Exs. 971-14B; Resp. Ex. 2193; Tr. 31465-68). The company has never made any extra charge for loading customers' trucks (Tr. 31467-68). Requests by customers for such deliveries have been infrequent but it has granted such requests not only by commercial customers but also by TVA (Tr. 31458-72).

13. Exception is taken to the failure to report the uncontradicted evidence showing that Volunteer's dealer policies and terms of sale have been arrived at without any understanding or agreement with competitors (Tr. 33009-10; 38645-49; Resp. Exs. 2926-27; Tr. 31867-75; 38637-41).

Paragraph 76

(*Vulcanite*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Vulcanite Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Vulcanite is

"identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report regarding Vulcanite that in order to save time and at the express invitation of the Trial Examiner (Tr. 38463; 38632; 39018) Vulcanite adopted as its own, evidence adduced in behalf of other respondents, in lieu of calling a witness. The testimony adopted by Vulcanite was directed at the charges in the complaint, including the subjects reported on in Paragraph 76, and expressly met and denied any implication of understanding, agreement or collusion on the part of Vulcanite (Tr. 48106-08).

4. Exception is taken to the failure to report regarding the reference in Paragraph 76 to the sale by Vulcanite of cement manufactured by Hercules the evidence which shows the following:

The Vulcanite mill has not been in operation since 1933 (Resp. Ex. 1100; Com. Exs. 426 O-Q; Tr. 17509-10). In 1933, during the NRA Code, Vulcanite entered into a contract whereby for a five year period it would purchase all its requirements for standard Portland cement from Hercules. The price determined upon was the actual cost to Hercules of putting cement on cars at the mill excluding all administrative overhead or selling expense. This amount has varied from year to year (Tr. 10568-70; 26272-73). Vulcanite has no financial connection or affiliation of any kind with Hercules other than this contract (Tr. 26280). The circumstances under which Vulcanite entered into this contract are fully explained in Resp. Ex. 1097 and Com. Exs. 426 O-Q.

5. Exception is taken to the citation of Com. Exs. 3128 A-L and to Tr. 10545-46 because they do not relate to the subject for which they are cited.

6. Exception is taken to the failure to report the evidence concerning Vulcanite's membership in The Cement Institute showing that:

Vulcanite has never had any understanding or agreement with any competitor that it would adhere to so-

code of ethics or code of practices. It did not subscribe to any code of ethics of The Cement Institute (Tr. 48106-08; 37607-08).

Neither The Cement Institute nor any competitor has ever been consulted in connection with the formulation of Vulcanite's price policies (Tr. 48106-08; 26136-37).

Vulcanite has never had any understanding with competitors that The Cement Institute freight rate books would be used by Vulcanite, nor regarding the manner in which Vulcanite would use these freight rate books (Tr. 48106-07; 37315-16).

Vulcanite has never had any agreement or understanding with any competitor as to how rates should be converted into cents per barrel (Tr. 48106-08; 38710).

7. Exception is taken to the failure to report regarding Vulcanite's pricing policies and practices the evidence which shows the following:

Vulcanite has a policy of attempting to meet the lowest price quoted by any competitor. It obtains information about competitors' prices from customers and from published tabulations of bids submitted to governmental agencies. Vulcanite has found that building material dealers and contractors are well informed as to delivered prices quoted by itself and competitors, and it notices that purchasers compare all cement prices to make sure that they obtain the lowest price quoted in any given market (Tr. 48106-08; 38742-44).

Vulcanite does not inform its competitors of a change in price nor does it receive lists of bases from its competitors (Tr. 48106-08; 38703).

Vulcanite does not have any agreement with any competitor to quote identical prices, nor that its prices will reflect some combination of some base plus freight. It does not have any understanding or agreement whereby it will maintain a particular price level in the area around its mill (Tr. 48106-08; 37605-06).

Vulcanite has not been guided by the views of anybody outside its own management with respect to the company's policies as to prices (Tr. 48106-08; 26136-37).

8. Exception is taken to the failure to report the evidence which shows the following regarding bids submitted to federal and state agencies by Vulcanite:

Vulcanite has never quoted the federal government in any territory where land grant freight rates were involved (Tr. 48106-08; 26174).

Vulcanite had no agreement with any competitors as to how it would treat the March 1938 invitation for bids by the Procurement Division (Tr. 48106-08; 38733).

With reference to Com. Exs. 372 A and 387 H (cited in Paragraph 76), Vulcanite bid the current commercial market prices at the destinations involved (Resp. Exs. 763, 764, 766, 768 and 774). Vulcanite's prices at many destinations did not bear any relation to the sum of some base plus freight rates (Com. Exs. 551 o, V, X, 2C; 1166; Resp. Exs. 3715; 783; 1316 A; Tr. 28044).

9. Exception is taken to the citation of Tr. 10545-46 and Resp. Ex. 1458 accompanying the reference to "dealer policies" because they have nothing to do with Vulcanite's dealer policies.

10. Exception is taken to the failure to report the evidence regarding the dealer policies and practices of Vulcanite which shows the following:

Vulcanite has not had any understanding or agreement to limit Vulcanite's sales to people coming within some definition of a dealer. In many instances it has sold cement to dealers who are not recognized as such by other manufacturers. In considering a new dealer account Vulcanite does not give any consideration to the fact that the dealer prospect is a member of any association of dealers (Tr. 48106-08; 37216-17). The Cement Institute has never taken any position as to who should be sold as dealers (Tr. 48106-08; 26208; 37217).

Vulcanite has never had any understanding or agreement with a competitor as to the kinds of work for which Vulcanite would sell cement direct and the kinds of work it would sell through dealer outlets (Tr. 48106-08; 37607).

11. Exception is taken to the failure to report the evidence showing that Vulcanite has never had any under-

standing or agreement with competitors to refrain from selling cement to dealers who handled imported cement (Tr. 48106-08; 26206); and that it has never had any agreement or understanding with any competitor concerning the prices which it quoted in the so-called "port areas" (Tr. 48106-08; 26196).

12. Exception is taken to the failure to report any of the evidence regarding Vulcanite's policies and practices with respect to terms of sale and diversions of cement in transit which shows the following:

Vulcanite has never had any agreement or understanding with any competitors to adhere to any particular terms or conditions of sale or discount (Tr. 48106-08; 37607). Since the expiration of the NRA Code, Vulcanite has not made any substantial changes in its contract forms. This has not been due to any arrangement or agreement with any of its competitors (Tr. 48106-08; 39509-10) It has never agreed to exchange specific job contracts with its competitors (Tr. 48106-08; 40096-97).

Vulcanite has never entered into any agreement with its competitors to prevent diversions of cement in transit or to stamp its bills of lading in order to prevent such diversions (Tr. 48106-08; 38720).

13. Exception is taken to the failure to report any of the evidence regarding Vulcanite's policies and practices with respect to the delivery of cement to customers' trucks showing that Vulcanite has never had any understanding or agreement with competitors to forbid such delivery or to make an extra charge for such deliveries (Tr. 48106-08; 37606-07).

14. Exception is taken to the failure to report the evidence which shows that Vulcanite has never entered into any agreement to restrict or limit the production of cement at its mill (Tr. 48106-08; 38691; Resp. Ex. 1097).

15. Exception is taken to the failure to report that Com. Exs. 3235-Z108 (cited in Paragraph 76) refers to a meeting of the Association of American Portland Cement Manufacturers held almost 30 years ago in December 1911.

Paragraph 77

(*Wabash*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Wabash Portland Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Wabash is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication that any of the acts or practices of the Wabash company have been adopted or carried on pursuant to agreement or understanding with any respondent. Exception is further taken to the failure to report the testimony of the president and treasurer of the company which showed that its policies and practices were adopted independently without understanding or agreement with any respondent (Tr. 47647-52).

4. Exception is taken to the failure to report the following evidence regarding the Wabash company generally:

Emil Stroh, former president of the company whose writings and acts are referred to in Paragraph 77, died prior to the closing of the Commission's case (Resp. Ex. 3753; Tr. 47976).

No Wabash company stock is owned by any cement company nor does Wabash own stock in cement companies (Com. Ex. 3148 B).

Wabash markets its cement in the States of Michigan, Ohio, Indiana, Kentucky and West Virginia, in part of Western Pennsylvania and in a small portion of southern Illinois (Tr. 47649).

The Wabash mills have a total annual capacity of 2,500,000 barrels. Its sales in 1930 amounted to 53.4% of its capacity (Com. Ex. 3148 B; Tr. 47649).

5. Exception is taken to the failure to report that the price Wabash bid on the letting referred to in Com. Ex. 178 A, cited in the Report, was the price on file with the NRA Code Authority for the cement industry (Resp. Exs. 811; 1717-18). Exception is further taken to the failure to report that the price Wabash bid on the letting referred to in Com. Ex. 373 A, cited in the report, was the current market price at the destination at which the government requested bids (Resp. Exs. 1742-43).

6. Exception is taken to the further failure to report the following evidence regarding the bidding practices and policies of the Wabash company:

Wabash has submitted bids to governmental agencies which were not identical with bids of competitors (Com. Exs. 772; 1863; 1875). It has also submitted bids f.o.b. mill to governmental agencies on numerous occasions (Com. Exs. 772; 1864; 1875; 1876; 1884; 1888; Resp. Exs. 51; 1009; 1064; 2351; 2709).

The evidence is that Wabash has never had an agreement or understanding with anyone regarding the manner in which it would bid in response to invitations of governmental agencies or the prices it would bid (Tr. 47651).

7. Exception is taken to the failure to report the following evidence regarding the pricing policies of the Wabash company:

Wabash independently decides upon the prices it will quote and the action it will take with regard to price increases. The company has quoted prices lower than those currently being quoted by its competitors and has at times not followed price increases instituted by competitors (Tr. 11353-54; 30089; 33410-11).

The evidence is that Wabash has never had any agreement with anyone to use or employ any particular method or system of pricing and that it has never had any agreement or understanding with anyone to quote identical prices (Tr. 47651).

8. Exception is taken to the failure to report that Wabash sells 57% of its total sales to its dealers (Tr. 47650) and that the evidence shows that the company has never had any agreement with anyone to use any particular method of marketing its product (Tr. 47651).

9. Exception is taken to the citation of Com. Exs. 3235-Z82; Tr. 573; 559; 583 in connection with "meetings and communications" of the Wabash company because they are not related to that subject.

10. Exception is taken to the failure to report that the meeting referred to in Com. Exs. 20 A-C, cited in Paragraph 77 concerned itself solely with matters pertaining to the drafting of an NRA Code for the cement industry (Tr. 982).

11. Exception is taken to the failure to report that the Wabash company has no prohibition against the trucking of cement and that it allows trucking (Resp. Ex. 51).

Paragraph 78

(*West Penn*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that West Penn Cement Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that West Penn is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is further taken to the failure to report that the chief executive of West Penn who was in sole

charge of its practices and policies testified regarding the history of the company and the origin and development of its practices and policies; and that this testimony showed that West Penn has never had any agreement or understanding with any competitor or that it was ever engaged in any collusive activity (Tr. 27870; and see below).

4. Exception is taken to the failure to report the following evidence concerning the organization and location of West Penn:

West Penn started up as a new company in February, 1927 when cement demand was increasing (Tr. 27667; 27669). The company started with one kiln, the annual capacity of which was 750,000 barrels but shipments during the first year of operation were so large that a second kiln was added in 1928. There has been no increase in capacity since 1928 (Tr. 27672; 27837; Resp. Ex. 1418). The plant is located on the site of a supply of raw materials sufficient for one hundred years' operation (Tr. 27844).

West Penn markets cement in an area described by Cleveland, Buffalo, Syracuse, Washington, Charleston, W. Va. and Columbus, Ohio, but the bulk of its cement is sold in the State of Pennsylvania and it comes into competition only with those respondents who likewise sell in that general area (Tr. 27689). Cement plants of five different independent producers are situated within a radius of 100 miles of the West Penn mill (Tr. 27684). West Penn is not affiliated with any other cement company nor are any of its officers or directors officers or directors of any other company (Tr. 27680; 27692).

5. Exception is taken to the failure to report the following evidence regarding West Penn's membership in The Cement Institute:

West Penn has not been active in the Institute and none of its representatives ever served on any committees or as officers or trustees (Tr. 27831). The Cement Institute has never had anything to do with West Penn's price policies and has not influenced them (Tr. 27722).

West Penn receives the Institute freight rate compilations which it uses as a convenience to determine the freight rates to various points (Tr. 27885; 27862). This service represents a substantial saving to the company (Tr. 27887). West Penn considered the matter of preparing its own freight rate books and decided that the cost of securing the Institute books was only a fraction of the expense which would be involved in making up its own compilations of the tariffs (Tr. 27751; 27885). West Penn has had no knowledge as to whether its competitors, or which of them, used the freight rate books of The Cement Institute (Tr. 27939-40).

West Penn has received the statistical reports of the Institute. Although they are similar to the reports of the Bureau of Mines, the Institute's reports have been more useful because they are disseminated earlier each month in point of time. West Penn has used these statistics to obtain a general idea as to the total business being done in its market territory and as a check on the efficiency of its sales force. There is no difference in the use which West Penn makes of the Institute's statistics and of the Bureau of Mines' statistics (Tr. 27846). West Penn has made no use of the figures showing individual competitors' shipments (Tr. 27831-32; 27836; 27844).

The evidence shows that West Penn has had no agreement with any competitors concerning statistics. Its shipments have fluctuated widely from year to year. When they have fallen off the sales force has been instructed to increase its efforts. The company has always tried to get more business (Tr. 27845; 27835-36).

West Penn plans its operating schedules ahead to avoid expensive shut downs. Every time a kiln is shut down and then started operating again, the life of the lining is reduced and the relining of one kiln costs $10,000 (Tr. 27835-37). The evidence shows that West Penn has never had any arrangement with competitors in its district for curtailment of production or for sharing available business, and has never discussed curtailment of production at any meeting or with any competitors at any time (Tr. 27830; 27845).

6. Exception is taken to the failure to report the following evidence regarding West Penn's pricing policies and practices:

When West Penn began to operate, its chief executive was familiar with cement prices because he had been in the crushed stone business and had been selling to cement dealers for a number of years. All of West Penn's customers request destination prices (Tr. 27726) and there has been no market for cement at its mill or in the town of West Winfield where the mill is located (Tr. 27722). The federal government is the only purchaser that has asked West Penn for prices f.o.b. mill, and it has done so only in a few instances, all of which occurred since the complaint was filed (Tr. 27918; 27941; 27745-46; Resp. Ex. 36). Accordingly, West Penn has largely quoted delivered prices to meet the lowest prices which it found (Tr. 27669; 27695-97).

West Penn's dealer and contractor customers notify the company immediately of any new prices quoted to them. When the reports come in to the office they are always verified by calling other customers in the same locality to see whether they have received quotations and by having West Penn salesmen interview dealers over the whole territory (Tr. 27698; 27703; 27876). West Penn has received no information from competitors as to price changes nor has it ever consulted with any other cement company regarding prices or price changes (Tr. 27699-720; 27936). The company keeps a running record of prices at various destinations compiled from reports of salesmen and dealers (Tr. 27706; 27878).

When a change in prices occurs West Penn analyzes the quotations it finds to determine how extensive the changes may be, and by checking the prices back to each competitive mill, determines whether or not some base is reflected. The company never knows from time to time which mills will be base mills (Tr. 27704-06; 27938). The only source of West Penn's knowledge as to prices or the existence of base mills is the quotations it finds in the field (Tr. 27880).

West Penn has frequently found competitors' quotations which did not appear to reflect any common point.

If such prices are the lowest in the given market West Penn meets them. West Penn never received any list of so-called arbitrary prices and never saw any such lists and none of its dealers received any such lists to West Penn's knowledge (Tr. 27870-72). The evidence shows that West Penn never received any list of basing points from the Institute or from competitors; it has never given out such list (Tr. 27862); it has never had any understanding with competitors concerning the use or non-use of basing points or base prices and never has any assurance that its prices will be as low as the lowest at any point (Tr. 27885; 27711).

West Penn has found that competitors sell at prices lower than their published prices to dealers and contractors. Such prices are usually "secret" prices but they do not remain secret very long; the dealer by a re-sale quotation usually reveals the fact that he has a secret price (Tr. 27715-16; 27748).

West Penn has not attempted to quote prices lower than the lowest prices last found at destination because it has lost a considerable amount of money over the past ten years selling at the prices which it has attempted to meet (Tr. 27946).

West Penn has not established a so-called base at its mill because West Winsfield is not far from Pittsburgh, where a base is usually reflected in prices, and there is not a sufficient amount of business in the intervening area to give West Penn any advantage in establishing a base; moreover to cause a reduction in prices sufficient to wipe out the effect of the Pittsburgh base, West Penn's base figure would have to be below its out-of-pocket cost (Tr. 27707). West Penn has no customers at its mill town in West Winfield, Pa. Only about 7% of West Penn's shipments are made to the towns between its mill and Pittsburgh (Tr. 27711-14).

West Penn's customers look to it for adjustment in case of loss in transit and West Penn files the claims with the railroads. West Penn has always treated its cement while in transit as its property (Tr. 27869).

7. Exception is taken to the failure to report regarding Com. Ex. 387 H, cited in Paragraph 78 as an identical bid,

that at all destinations where West Penn's prices were identical with competitors' prices, its bids represented the current commercial market prices at the destinations (Resp. Exs. 766; 767; 774); that with the exception of one destination the prices bid by West Penn did not reflect a base figure at any mill (Com. Exs. 1166; 551-2C); and further, that it is the general practice of West Penn to bid its commercial market prices taken from its office records on all bids to government agencies (Tr. 27863).

8. Exception is taken to the failure to report the following evidence regarding Com. Ex. 178-A, cited in Paragraph 78 as an identical bid:

This bid was for the Tygart River Dam and occurred during open price filing under the NRA Code. West Penn received a notice from the Code Authority of the lowest prices filed for this destination and it based its quotation on that information. West Penn had no contact with competitors concerning the prices it quoted on this job or on any other job. West Penn has never consulted any competitors as to the prices it has bid (Tr. 27818; 27866; Com. Ex. 178 A; Resp. Exs. 811; 1717; 1718).

9. Exception is taken to the failure to report regarding Com. Ex. 373 A, cited in Paragraph 78 as an identical bid that West Penn had a dealer at the delivery point and bid the same price that it had been quoting to the dealer (Tr. 27866-67).

10. Exception is taken to the further failure to report the following evidence regarding West Penn's bids to government agencies:

The company has submitted only a few bids to State Highway departments and agencies of the federal government (Tr. 27867). West Penn has bid higher prices than competitors on lettings where it quoted what it believed to be the current market price, and it turned out that West Penn did not have the latest information. For example, on the proposal of the Soil Conservation Service for bids for delivery at Coshocton, Ohio, July 21, 1936, the bid submitted by West Penn turned out to be higher than all of its competitors, because it did not have accurate informa-

tion as to the latest market quotation. West Penn received no part of the award (Tr. 27868; Com. Ex. 1089); again, on Com. Ex. 387 H West Penn's bid was high at Annapolis (Com. Exs. 551-2C; Resp. Ex. 3715).

West Penn has never quoted or done business in any territory in which land grant rates were involved (Tr. 27750).

11. Exception is taken to the failure to report that West Penn has come into competition with imported cement but has never attempted to boycott or refuse to sell dealers who handled imported cement (Tr. 27685; 27811).

12. Exception is taken to the failure to report that West Penn never had any practice regarding diversion of cement in transit. It does not favor diversion of its shipments because it would permit a dealer in one town to take business from a dealer in another town who has been developing a market for West Penn's product. West Penn has never stamped its bills of lading (Tr. 27811-12).

13. Exception is taken to the failure to report the following evidence regarding truck and water delivery by West Penn:

When West Penn began to ship cement in 1927, it made no deliveries to trucks. In 1928 West Penn had some requests for truck delivery, but the demand amounted only to a small percentage of West Penn's business. In response to such requests West Penn loaded trucks for customers from surrounding towns and at times it hired truckers to deliver cement into Pittsburgh to meet the competition of cement trucked by buyers from competitors' warehouses in Pittsburgh (Tr. 27790-91). As time went on, demand for trucking lessened and an increasingly large number of West Penn's customers expressed themselves as dissatisfied with trucking (Tr. 27795). In May, 1931 West Penn ceased to take new orders for delivery by truck, but it continued, until December, to deliver to trucks on jobs for which contracts had been taken.

West Penn experienced difficulty with truck loading and found it unsatisfactory and more costly than car loading. The trucks interfered with the loading of cars and

involved extra cost in handling and loss from the trucks en route. Moreover, delivery to trucks was putting West Penn into the retail business (Tr. 27794; 27796; 27922). When West Penn first loaded trucks, it charged 20 cents a barrel loading charge. Later to meet competition it reduced that charge to 15 cents and for a period it made no charge for truck loading.

When West Penn found that it could discontinue trucking without hurting its position with its dealers it did so without any notice to, or contact or agreement with competitors (Tr. 27797-801-02; 27870). In the course of general discussions with many customers, West Penn found them well satisfied that West Penn had discontinued trucking and it has had no requests from customers for truck delivery after it discontinued trucking (Tr. 27801; 27810). None of West Penn's competitors discontinued trucking in May, 1931, but some of them did so later (Tr. 27797).

West Point has never obtained or solicited any short haul rates and never had any correspondence with competitors concerning railroad rates (Tr. 27799-800; 27804).

West Penn has had no occasion to make shipments by water except very infrequently where the cement was going to be used on dams or river piers, at points on the Alleghany and Ohio Rivers. These shipments went partly by rail and West Penn invoiced the customer at the destination price and allowed him to deduct the transportation charges (Tr. 27810-11).

14. Exception is taken to the failure to report the following evidence regarding the dealer policies of West Penn:

West Penn has never had any conferences with competitors regarding dealer policies. Its policies have been determined on its own initiative and individually, with consideration given to the desires of its customers, so far as they are not at variance with the best interests of the company. West Penn has been free to sell to anyone it chose, either as a dealer or otherwise (Tr. 27898-99; 27752; 27759-60).

In about 1931, West Penn began to sell more business direct to the consumer, such as certain types of business

outside of cities, town and villages (Tr. 27772). West Penn has had a definite dealer policy since before the NRA Code and it has made no change in it. That policy has been to sell through dealers, except on purchases by the federal government, by State Highway departments and railroads. Sales to dealers represent about 60% of West Penn's sales (Tr. 27911; 27914; 27752).

West Penn's dealers are important to the company in the matter of retail credits and collections and other services as well as from a selling standpoint (Tr. 27752). West Penn's qualifications for its dealers vary according to the needs of the community but it has always selected its dealers carefully. It does not sell to a dealer until it is satisfied as to his financial responsibility and his ability to do a good promotional job, as evidenced by his investment in warehouses, trucks, sales staff, etc. in comparison with other dealers in the vicinity (Tr. 27756; 27855-56). Some of West Penn's competitors sell to dealers who do not meet West Penn's qualifications (Tr. 27753).

West Penn, individually, has at times written to dealer associations in order to obtain all possible information concerning prospective dealers. West Penn has solicited information from dealer organizations in the same way that it has solicited credit information from Dun & Bradstreet whose reports did not show whether the dealer was properly equipped—an important factor to the company (Tr. 27756-58; 27909). West Penn has never asked consent of any dealer association before quoting a dealer nor refused to sell to any of its dealers because of a complaint by a dealer organization (Tr. 27908; 27760). Membership or lack of membership, in a dealer association has never been considered by West Penn in determining whether it would sell to a dealer (Tr. 27754).

15. Exception is taken to the failure to report that the evidence shows West Penn has never had any agreement or understanding with any competitor regarding its terms of sale (Tr. 27870).

West Penn protects its customers against a decline in prices during the life of any contract, giving them the benefit of the lowest current market price and it so states

in its contract forms (Tr. 27915). It also protects its customers retroactively in case of a price reduction, including allowances on cars in transit, so far as necessary to meet competition or preserve the good-will of its customers (Tr. 27716-18). In the case of a price advance, which West Penn decides to follow it favors its customers with the old price for a sufficient time to protect them against loss due to shipments in transit (Tr. 27857; Com. Ex. 2383).

Generally, West Penn, in the case of a price advance, does not get the benefit of the new price covered by a contract for many months (Tr. 27722).

16. Exception is taken to the failure to report the following further evidence regarding West Penn:

West Penn has never engaged in any propaganda concerning the cement industry or concerning its product. West Penn's standard cement is above the minimum specifications and the company advertises the superiority of its cement on a quality basis and prints such advertisements. It has been unable, however, to obtain any higher price for its brand than the lowest price for which competitors' brands are selling. In addition to standard Portland cement, West Penn makes high early strength cement, modified Portland cement, sulphate resisting cement and other special specifications to meet the requests of State Highway departments and other engineers from time to time (Tr. 27854; 27816; 27926).

Com. Ex. 1364 cited in Paragraph 78 has no bearing on the West Penn Company.

Paragraph 79

(*Whitehall*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Whitehall Cement Manufacturing Co. is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in

the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Whitehall is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that the evidence shows the following regarding the location and operations of Whitehall:

Whitehall is a small company. Its quarry is adjacent to the mill and contains sufficient rock for 45 years' operation at full capacity (Tr. 28474; 28486). The Whitehall plant is less than one mile from Northampton, in the Lehigh Valley (Tr. 38473). Freight rates from Whitehall's plant are the same as they are from Northampton (Tr. 28527). Whitehall solicits sales and normally ships cement into New England, New Jersey, Delaware, Maryland, Eastern Pennsylvania, parts of New York State and Virginia, and Washington, D. C. (Tr. 28486). At one time Whitehall shipped cement into Ohio, West Virginia and northern New York but competition from new mills in this territory became so severe that Whitehall was forced to abandon these markets (Tr. 28486; 28649). There was a time when Whitehall could have produced 2,100,000 barrels of cement annually but due to changes in cement specifications, Whitehall's present annual capacity is now smaller. (Tr. 28479-81).

In 1927 and 1928 Whitehall operated at from 75 per cent to 80 per cent of its capacity; in 1932 and 1933 it operated at from 25 per cent to 35 per cent of its capacity; in 1938 it operated at from 75 per cent to 80 per cent of its capacity (Tr. 28481).

4. Exception is taken to the failure to report that the evidence shows the following regarding Whitehall's membership in The Cement Institute:

Whitehall joined The Cement Institute in 1933 because the Institute had been selected to represent the cement in-

dustry for the purpose of cooperating with the federal government pursuant to the provisions of the recently enacted National Industrial Recovery Act (Tr. 28525; 28703; Resp. Exs. 1628-29). Whitehall continued its membership in the Institute after the *Schechter* decision because it expected that NRA would be reinstated in some other form (Tr. 28703) and because the Institute freight rate service saves Whitehall money and labor (Tr. 28526; 28679; 28684; 28686). Prior to subscribing to the Institute's freight rate books, Whitehall used the freight rate service of the National Freight Rate Service and, previous to that, it used the books of the Nazareth Traffic Bureau. Whitehall made no changes in its pricing policies or practices when it began to use the Institute freight rate books (Tr. 28526). There is no difference in the manner in which Whitehall has used the Institute books and the manner in which it used other freight rate books (Tr. 28689-90). Whitehall has never had any agreement to use the Institute freight books or as to how it would use them (Tr. 28528).

Whitehall uses statistics received from the Bureau of Mines, Dun & Bradstreet, the Dodge Service and the Institute as a gauge of business conditions. Whitehall has never been concerned with the shipment figures of its competitors. There has never been any difference in the manner in which Whitehall has reported its figures to the Institute and to the Bureau of Mines (Tr. 28483-85).

During the NRA Code period a representative of the Whitehall company attended one meeting in Chicago at which the Code Plan for Sharing Available Business (Com. Exs. 2917; 597) was presented and Whitehall voted against it. Whitehall has never known of any allocation of business and it has never relaxed its efforts to get business at any time (Tr. 28477-78). Whitehall has never made any shipments of cement for the account of any other cement company nor has any other company made shipments for Whitehall (Tr. 28475).

No officer of Whitehall has ever been an officer or trustee of The Cement Institute (Tr. 28633). Whitehall has not been represented at any meetings of the Institute since the Code period (Tr. 28625; 28633). The Cement Institute

has never influenced any of Whitehall's policies or practices (Tr. 28485; 28519; 28526; 28543-45; 28555-58).

5. Exception is taken to the failure to report that the evidence shows the following with regard to the pricing policies and practices of Whitehall:

Whitehall has always found that cement was being sold at destination prices and commercial customers have not requested f.o.b. mill quotations (Tr. 28680).

Whitehall has always endeavored to meet the lowest price quoted by any competitor. It learns of competitors' prices from its customers who are always being solicited by competitors (Tr. 28497; 28499; 28575; 28658; 28680; 28693). When a price quoted by Whitehall has been higher than that of a competitor, Whitehall either has been given an opportunity to meet the competitor's price or it has lost the business (Tr. 28651; 28658). Documentary evidence demonstrating the manner in which Whitehall obtains information about competitors' prices was rejected by the Examiner (Resp. Exs. 1619-26 for id.).

Whitehall analyzes the quotations picked up in the field to determine whether or not the prices quoted relate back to basing points. Whenever prices appear to relate to basing points, the basing points are listed and used in maintaining a card index of destination prices, which when quoting prices, in order to save time, is referred to in the absence of other price information (Tr. 28515-16). Whitehall has never had any agreement or understanding with competitors regarding basing points (Tr. 28517). Whitehall never received a list of basing points from competitors or from The Cement Institute and it has never supplied its competitors with Whitehall's own list of basing points (Tr. 28519).

Whitehall is free to establish a base at its mill whenever it chooses to do so. It has not made its mill a base because the mill is less than a mile from the Northampton base and there is no market for cement in the vicinity of Whitehall's plant or the three competitor plants adjacent to it (Tr. 28517; 28600).

Whitehall has not met all price advances made by competitors. The Examiner rejected evidence explaining a

price increase made by a competitor which Whitehall did not follow (Tr. 28635-48; Resp. Ex. 1639).

Whitehall's prices are not the result of any conference or agreement with competitors; whether Whitehall meets a price change or withdraws from the market depends on a number of conditions and factors, among which are the following: The amount of business being done at the time and the condition of its order book, the specifications and the time of delivery, whether the market is permanent and the return Whitehall gets on the business (Tr. 28498).

During the NRA Code period, Whitehall filed prices with the Code Authority for each destination at which it was soliciting business (Tr. 28659-60). Whitehall did not consider that there was any restriction as to what prices it could file or that it was required to quote or file the same price that any other company filed. The NRA Code Authority never attempted to control the prices or the terms and conditions of sale which Whitehall filed. Whitehall has not filed any prices since the *Schechter* decision (Tr. 28596-97; 28536).

6. Exception is taken to the failure to report that the evidence shows the following regarding bids submitted by Whitehall to state and federal agencies:

The federal government is a very small customer of Whitehall. Sales made by Whitehall to the federal government have never amounted to as much as one per cent of its total sales in any year except 1934; in 1934 the United States Government purchased 1.54 per cent of Whitehall's total shipments (Tr. 28609-10; 28612. Resp. Ex. 1638 for id., showing this, was rejected by the Examiner).

Whitehall has found that the cost of selling cement to the government is as great as the cost of selling to commercial customers (Tr. 28608). It has found that government jobs require more service than commercial jobs, require special bins (Tr. 28615), and cause increased costs because inspection is made at the mill and loading must be provided for during certain hours only. This creates conflicts with Whitehall's commercial business (Tr. 28653; 28663). Whitehall does not feel that the federal government is entitled to any special concessions in prices (Tr. 28598).

In arriving at the prices named in the few bids by Whitehall to the United States Government and state highway departments, Whitehall has followed the practice used by it for commercial quotations. It quoted what it found to be the current market prices at the points at which it bid (Tr. 28601-03; 28605; 38607-08).

Whitehall has bid a higher price than competitors where it had not learned the latest lowest price in the field and bid the price shown by its records as the last current market price (Tr. 28655; Com. Exs. 1099 W; 551-2C; Resp. Ex. 3715).

Whitehall's prices on Com. Ex. 1099 W were not the equivalent of any combination of price base plus freight rates except in one instance (Com. Exs. 551-o, V, X; 551 2C; 1166). On the other lettings referred to in the Report, Whitehall did not bid at many destinations at which competitors bid and at many destinations competitors bid prices which were higher or lower than the bids submitted by Whitehall (Com. Exs. 9-C; 1099 R).

On sales to the federal government Whitehall has found that its market is at destination and that it meets its competition at the point of final delivery (Tr. 28608). Whitehall had no requests for f.o.b. mill bids from the federal government prior to April 1938 (Com. Ex. 1339) and it has never had any requests from other customers for f.o.b. mill bids (Tr. 28635-36). Whitehall did not bid on Com. Exs. 1339-40 because it required cement of a type which Whitehall was not prepared to make and because Whitehall regarded it as only an option which would have required the company to furnish cement which was outside its regular line, and for which it had no other market, without any guarantee or assurance that any of it would have been taken, and because the invitation was vague concerning requirements for delivery (Tr. 28633-35).

Whitehall did not bid on the government invitation which called for delivery in Mississippi (Com. Ex. 1063) because it is entirely out of the territory in which Whitehall could be competitive (Tr. 28487). Whitehall did not bid on the government invitation which called for delivery in Ohio or West Virginia (Com. Ex. 1394) because local mills in that territory have a better freight rate and Whitehall

did not think it had any chance of getting business because the government would have to pay the freight from the Whitehall mill to the point of use (Tr. 28651). Whitehall did not bid on Com. Ex. 1399 because it called for delivery outside the territory in which Whitehall can be competitive and for the further reason that it called for cement of a test which Whitehall did not make at the time (Tr. 28633).

Whitehall has had no contact with competitors in regard to what action it would take on any government invitation (Tr. 28635-36).

Whitehall has never quoted in any territory where land grant rates were involved, and has never selected any route which deprived the government of any special or land grant rate (Tr. 28529; 28551).

7. Exception is taken to the failure to report any of the evidence regarding Whitehall's marketing policies and practices. This evidence shows the following;

Whitehall has had the same concept of a dealer since 1918. Whitehall considers a dealer to be a man who handles a line of building materials and who services the trade at a given point. Whitehall has never issued a definition of a dealer. The NRA Code provisions did not in any way change Whitehall's ideas as to whom it considered to be dealers (Tr. 28553). In soliciting new accounts the Whitehall salesmen call on all the people selling cement in a given town and if they obtain orders Whitehall decides whether the credit and facilities of the prospects are satisfactory.

In determining whether to sell a man as a dealer, Whitehall has never consulted anyone outside the company. Its policy in regard to what dealers it would sell has not been dependent upon, affected or influenced by any of its competitors or by The Cement Institute or by the dealers' membership or non-membership in any dealer organization (Tr. 28555-58). The dealer has been the principal outlet for Whitehall cement since 1918. The Examiner rejected evidence showing that the great bulk of Whitehall's business has been sold to dealers reaching as high as 98% in 1937 (Resp. Ex. 1632 for id.; Tr. 38572-73).

Whitehall has never followed any so-called plan for the classification of business except during the Code period, and it has never issued any printed announcement of its sales policy. Whitehall has never had any agreement with competitors regarding its classification of business (Tr. 28576).

8. Exception is taken to the failure to report any of the evidence regarding Whitehall's policies and practices in competing with imported cement. This evidence shows the following:

Whitehall has met special or depressed prices in areas affected by imported cement in order to take care of its trade. Seventy per cent to 75 per cent of Whitehall's shipments were made into areas affected by depressed prices; sometimes it met them and sometimes it lost the business. Whitehall discovered these special prices from dealers who said they lost jobs to imported cement and from salesmen who reported that they could not sell jobs on account of imported cement (Tr. 28530-31).

Whitehall never at any time refused to sell cement to any dealer who handled imported cement (Tr. 28673). This was true during all of the period Whitehall has been a member of the Institute as well as prior thereto. Whitehall has never had any policy in respect to dealers who handled foreign cement and has never instructed its salesmen to refuse to sell such dealers. It never refused to sell to Jenney & Lux and none of its salesmen ever watched the Jenney & Lux plant (Tr. 28532). Whitehall salesmen are instructed to report anything they find of interest in the field, including information concerning imported as well as domestic cement and this has always been Whitehall's practice (Tr. 28534). Whitehall has never established any stocks of cement in Brooklyn (Tr. 28536).

9. Exception is taken to the failure to report any of the evidence regarding Whitehall's terms of sale and practice regarding diversions, which shows:

Whitehall has used only one form of sales contract since 1918 (Resp. Ex. 1633) except that during the NRA period, pursuant to the code, Whitehall used the form shown in Resp. Ex. 1634 which was discontinued after the

Code (Tr. 28596; 28579-80). Whitehall did not adopt or follow the so-called Lehigh selling plan and it was never approached by any competitor in regard to that plan (Tr. 28577).

Whitehall has never used any stamp on its bills of lading prohibiting diversions of cement in transit (Tr. 28588).

10. Exception is taken to the failure to report any of the evidence regarding Whitehall's policies and practices with respect to shipments of cement by trucks and by water. This evidence shows the following:

Whitehall has never taken any action to prevent the use of trucks for the delivery of cement (Tr. 28543). It has never had any fixed policy in regard to sales for truck delivery. Its sales for truck delivery have never exceeded 500 barrels per year, practically all of which has been a petty cash proposition to its employees or to someone in the immediate vicinity who required a few barrels. All of these deliveries by truck were in small lots of less-than-carload. Deliveries by truck have never amounted to more than 1/20th of 1 per cent of Whitehall's total annual shipments (Resp. Ex. 1630; Tr. 28539-41). Whitehall was never influenced by The Cement Institute or by any dealer association or by any railroad in regard to trucking cement, or the loading of trucks at its mill (Tr. 28543-45). None of Whitehall's representatives ever conferred with any railroad officials in regard to trucking of cement and no representative of a dealer association has ever conferred with Whitehall about this subject (Tr. 28537-38). No representative of Whitehall has ever attended any meetings at which trucking of cement was discussed (Tr. 28545).

Whitehall has never had an opportunity for delivery of cement by water from its plant. There has never been any means of transportation cheaper than rail transportation by which Whitehall can distribute its cement (Tr. 28544-45).

11. Exception is taken to the failure to report that Com. Ex. 1131 J (cited in Paragraph 79) refers to a single meeting which Whitehall attended at the express request of Secretary of Commerce Lamont who presided at the

meeting (Tr. 28577-78; Com. Ex. 1131 J). Exception is further taken to the failure to report the evidence showing that no representative of Whitehall has ever attended any meetings with competitors except duly constituted meetings of The Cement Institute during the NRA Code period which are fully reported by the minutes in evidence (Tr. 28633; 28517). Exception is further taken to the failure to report that none of the officers of Whitehall are or ever have been officers of any other cement company and that Whitehall is not affiliated with any other cement manufacturer (Tr. 28473).

Paragraph 80

(*Wolverine*)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Wolverine Portland Cement Co. is "identified" or connected by the evidence with any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited. (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Wolverine is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to any implication that the acts and practices of Wolverine in issue were adopted or carried on pursuant to an agreement; and to the failure to report that the Vice-President in charge of sales appeared as a witness and testified fully regarding the origin and development of the company's practices and policies and showed that they were used independently without agreement (Tr. 35868-36078).

4. Exception is taken to the failure to report the following evidence regarding the operations and location of the company generally:

Wolverine is a small company, whose two mills have a combined capacity of 1,000,000 barrels. These plants are up-to-date efficient plants. Wolverine is not connected with any other cement company through stock or otherwise (Tr. 35893-94).

Wolverine markets its cement in southern Michigan, northern Indiana, and northwestern Ohio (Tr. 35895). It has had no agreement to limit production or shipments, or to allocate business (Tr. 36036-37).

5. Exception is taken to the failure to report the following evidence regarding pricing by Wolverine:

Wolverine receives no requests from dealers or contractors for f.o.b. mill prices. Their requests are for delivered prices. Government agencies also usually request delivered prices (Tr. 35907-08).

The evidence shows that Wolverine has had no agreement that it would sell only at delivered prices (Tr. 35979) and it has made f.o.b. mill bids (Com. Exs. 1864; 1863).

Wolverine is usually a price follower. At times, however, it has sent out prices which were not the same as those quoted by competitors (Tr. 35905). Except for such prices Wolverine quotes the lowest price it finds in a market regardless of whether or not it appears to reflect a pattern (Tr. 35905-06). It cannot sell its cement for more than any competitor sells its cement and competitors meet lower prices whenever quoted (Tr. 35900-01; 35914).

Wolverine secures its information as to prices from the consumer trade and not from competitors (Tr. 35899-900); 35904; 35981; 36038). Documentary evidence to show this was rejected by the Examiner (Resp. Ex. 2645 for id.). It has found that delivered prices sometimes follow a logical pattern. There have been zone prices for entire states or groups of counties, and prices have also radiated out from some shipping point (Tr. 35902-04).

Wolverine is free to make its mills base mills if it so desires, but their location and low prices in its market area make it inadvisable (Tr. 35906). It has had no agreement

as to which mills should be base or non-base mills, or what the base figure should be (Tr. 36045); or what it would charge for cement (Tr. 36026). It does not receive advance knowledge of price changes from competitors (Tr. 36043).

From June 1936 until the time of the complaint prices in Wolverine's sales area steadily declined. An attempt in December 1936 to raise prices 10¢ per barrel was not followed, and it was never effective (Tr. 35908-10; 36073).

Wolverine's salesmen are given lists of delivered prices (Tr. 35912; Resp. Ex. 2630). They never calculate prices by use of a freight rate book (Tr. 35912). They are not given copies of the Institute rate books (Tr. 35920).

Wolverine finds that competitors at times make special price concessions. Wolverine has also done so (Tr. 35916).

Dealers pay the transportation charges to the carrier for Wolverine's account (Tr. 36064). The company handles claims for loss or damage in transit in its own name (Tr. 36065).

6. Exception is taken to the failure to report, regarding "bidding" by Wolverine, that it usually bids its current commercial prices, but has bid f.o.b. mill (Tr. 35913; Com. Exs. 1863; 1864). U. S. Government sales ordinarily constitute from .002% to 1% of the company's total sales. Wolverine has bid prices which were not identical with prices of competitors (Com. Ex. 1863).

7. Exception is taken to the failure to report that the evidence shows the following regarding the dealer policies of Wolverine:

Wolverine markets 90% of its cement to dealers (Tr. 35916; 35895; 36040). Wolverine must preserve its dealer outlets and foster dealer good will and therefore its dealers have a tremendous influence on Wolverine's marketing methods and policies (Tr. 35916).

Wolverine's concept of a dealer "varies, depending upon whether or not Wolverine has adequate dealer representation in a given market and upon the size and needs of each market" (Tr. 35917). It has had no agreement through the Institute or otherwise as to whom it will sell as a dealer and does not require a prospective dealer to be

sold to by a competitor before it will sell to him (Tr. 35992; 36026).

Wolverine determines whether it will sell to a dealer or direct on the basis of whether dealer service is required. It issued an announcement of its policy only on one occasion—in June 1935 (Tr. 35917; Resp. Exs. 2631 A-B). It followed Article XI of the NRA Code during its existence and found it not substantially different from Wolverine's prior practice (Tr. 35917). Wolverine has had no agreement or understanding regarding its sales policy at any time (Tr. 35917). Its practice is not identical with competitors (Tr. 36000).

8. Exception is taken to the failure to report the following evidence regarding truck delivery of cement by Wolverine:

Wolverine trucks cement and has been using the same general trucking policy from March 1933 (Tr. 35918). All but a small percentage of its Michigan shipments moves by truck (Tr. 36051-52) and Wolverine allows dealers to come to the mill and take cement in their own trucks (Tr. 35919).

It is Wolverine's experience that loading and delivering by truck is more expensive than loading and delivering by rail car (Tr. 35919) but Wolverine has never had a 15¢ surcharge for truck delivery (Tr. 35919-20).

9. Exception is taken to the failure to report that Wolverine does not come into competition with imported cement (Tr. 35920).

10. Exception is taken to the failure to report that the evidence shows that Wolverine has never placed a no-diversion stamp on a bill of lading (Tr. 36041); it has never taken any cooperative steps to prevent diversions (Tr. 36041); and has never had any agreement to quote the same terms of sale and discount (Tr. 35988).

11. Exception is taken to the failure to report the following evidence regarding Wolverine's membership in The Cement Institute:

Wolverine joined the Institute in 1933 at the time of the NRA Cement Code (Tr. 35922). The Institute never re-

quested Wolverine to adopt any practices or marketing policies, and never acted as an arbitrator of company policies (Tr. 36025-26).

Wolverine uses the Institute statistics as a source of general information (Tr. 35922-23; 36036).

Wolverine's salesmen do not carry Institute or any other freight rate books (Tr. 35920; 36050). Wolverine uses the Institute rate books in the home office as one source of rate information (Tr. 35921). They are used because they provide a cheap and convenient method of securing such information (35921; 36029-30).

Wolverine has had no agreement either to use the Institute rate book, or to use it right or wrong (Tr. 36027).

12. Exception is taken to the failure to report that Com. Exs. 23 A and 1496 A-C relate to an NRA Code meeting (Tr. 38826; 38782).

Tr. 11529-33 (cited in Paragraph 80) has no bearing on Wolverine.

Paragraph 81

(Yosemite)

1. Exception is taken to the implication suggested by Paragraph 82 and the footnote to page 9, that Yosemite Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, *supra*).

2. Exception is further taken to the assertion in Paragraph 82 and the footnote to page 9 that Yosemite is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report the testimony of a responsible executive of Yosemite which shows that Yosemite has not adopted or carried on any policy or

practice as a result of any understanding or agreement with competitors (Tr. 42846).

4. Exception is taken to the failure to report the evidence showing the following regarding the operations of Yosemite:

Yosemite is a comparatively small company with a single plant which has a capacity of approximately 2700 barrels per day. This plant has been in operation since 1927 (Tr. 42844). None of its officers or directors are affiliated with any other cement manufacturing company (Tr. 42843-44).

Yosemite sells 97 per cent of its output in northern and central California and the remainder is marketed in southern Oregon and western Nevada (Tr. 42844).

5. Exception is taken to the failure to report the evidence showing the following with regard to the pricing policies and practices of Yosemite:

Yosemite has never agreed with any competitor, either expressly or impliedly, to use or employ a particular system or method of pricing (Tr. 42846).

Yosemite has never agreed with any competitor, either expressly or impliedly, to quote the same price for cement, at any place, to any customer, or make the same bid for any public contract (Tr. 42846).

When Yosemite began to sell cement, it adopted a policy to attempt to meet the lowest price quoted by any other cement manufacturer, and this policy has never been changed. Yosemite learned of competitors' prices by obtaining their published price lists from dealers. In order to save expenses, Yosemite has issued very few price lists of its own (Tr. 8733-38). From time to time, Yosemite has sold at prices below those published in its published price lists (Tr. 8761).

Yosemite's prices to the federal government have always been the lowest prices quoted to anyone and often have been below its published list prices (Tr. 8761-62).

6. Exception is taken to the failure to report that Yosemite has been unable to sell cement at terms of sale and discounts less favorable than those offered by competitors just as it has been unable to sell cement at any price higher than that quoted by a competitor (Tr. 8741; 42846).

7. Exception is taken to the failure to report regarding the letting referred to in Com. Ex. 1212 that Yosemite bid its current commercial price at the destination involved pursuant to its long established policy of meeting the lowest published price quoted by any competitor (Com. Exs. 1212; 2049 H; 2063 D): Com. Ex. 1099 D, cited in Paragraph 81, shows on its face that the price quoted by Yosemite at the letting involved was not identical with that quoted by any other bidder.

8. Exception is taken to the failure to report regarding Yosemite's membership in The Cement Institute the evidence showing that Yosemite joined The Cement Institute in 1933 because the Institute had been recognized by the federal government as the vehicle for preparing the NRA Cement Code (Tr. 8758-59).

9. Exception is taken to the failure to report the evidence showing the following regarding Yosemite's marketing policies and practices:

Yosemite is not engaged in selling cement at retail but confines its sales to dealer outlets and to certain large users of cement namely, federal and state governments, railroads, contractors engaged in certain kinds of work for federal and state governments and contractors engaged in work for railroads, major water-power developments, flood control projects and irrigation districts. It also sells cement to manufacturers of cement and concrete products and to commercial concrete-mixing plants (Tr. 42844-45).

To promote and continue harmonious business relations with its dealer customers Yosemite has always had a policy of refusing to sell cement to dealers for delivery to destinations where they do not have facilities for rendering the usual dealer services to consumers (Tr. 8742).

Tr. 8741, cited in Paragraph 81, as bearing on Yosemite's dealer policies has no relation to the subject.

10. Exception is taken to the failure to report any of the evidence regarding Yosemite's trucking policies and practices. This evidence shows the following:

Yosemite has not refused to sell cement for delivery to customers' trucks nor has it imposed any extra charge for

cement delivered to trucks supplied by customers. Virtually none of Yosemite's customers own trucks but whenever requested to do so by a customer, Yosemite has loaded the trucks of trucking companies selected by customers. There has been little demand for truck deliveries (Tr. 8738).

Yosemite has found that it is more expensive to deliver cement by truck because of higher loading costs (Tr. 8760).

Paragraph 82

1. Exception is taken to Paragraph 82 in its entirety because it erroneously implies that each respondent has been connected with all the activities of the Institute and "other group activities" whereas the evidence shows that most respondents had no connection with the Institute prior to its collapse in 1930 and only joined the Institute and participated in its activities to the limited extent required for the formulation of NRA Code provisions; and that most respondents had no connection with "other group activities" (See exceptions to Paragraphs 1-4; 7-81, *supra*).

2. As to the report in its entirety, exception is taken to the method employed in reporting the evidence to the Commission on the grounds that it is not within the authority of the Trial Examiner to select issues or subjects upon which findings are to be made by the Commission or upon which he reports evidence and that it is not within the authority of the Trial Examiner to weigh the evidence on different subjects for the purpose of selecting the subjects or evidence to be reported.

3. Exception is taken to the many conclusions which are stated in the Report on the grounds that they do not constitute a "report on the evidence" and that they are founded, in most cases, on only a small portion of the evidence, a misconception of the evidence or no evidence.

4. As to the report in its entirety, exception is taken to the failure to report evidence in support of the respective defenses of respondents and evidence which negatives the allegations of the complaint.

5. As to the report in its entirety, exception is taken to the failure to report the evidence specifically as to each respondent on each of the issues raised by the pleadings on the ground that such evidence is essential to a fair determination of what the ultimate findings should be as to each respondent on the issues of conspiracy.

Paragraph 83

Exception is taken to Paragraph 83 and so much of Paragraphs 15, 28, 51, 54 and 69 as is incorporated therein by reference because it is an inadequate report on the evidence and tends to mislead. Exception is further taken to the failure to report the following:

The evidence is uncontradicted that five respondents Castalia, Great Lakes, Northwestern, Superior Inc., and Valley Forge do not sell and ship their products from their mills to states or territories other than those of origin (Tr. 26549; 27177; 48115; 3227-29; 3248-49; 8453; 8434; 3225-27; 10519-21). Beaver, Calaveras, California, Idaho, Pacific and Yosemite make only a few such shipments and these do not constitute a steady stream of trade and commerce (Tr. 47764, 42852; 42555-56; 42457; 42836; 42844; 8325-29; 47637-38; see also exceptions to Paragraphs 11, 13, 35, 55, 74 and 81, *supra*).

"Facts of the Cement Industry"

Paragraph 84

1. Exception is taken to the statement purporting to describe "Portland cement" because it is a misdescription, not supported by the evidence or the references cited. Portland cement is accurately and scientifically described in the evidence; the complete specifications are shown, as well as the definition promulgated by the Federal Specification Board which is adhered to by the American Society of Civil Engineers and the American Society for Testing Materials; and which is used in U. S. Government specifications (Resp. Exs. 415; 418; 419; 421; 422; 423; Tr. 22514; 22797-98; 22853; 22860; 22863).

Further exception is taken to the failure in this connection to report the following: Portland cement [not to be confused with masonry cement (Tr. 22514-16)] is the only chemically active substance used in concrete and is the binding agent which gives strength to the mass. The standard specification for Portland cement is considerably higher than for natural cement (Tr. 22521-22; 22530; 22973). The evidence shows the original and historic derivation of the words "Portland cement". There is no connection between any two companies because they both manufacture "Portland cement" or use the words "Portland cement" in their respective names (Tr. 22516-18; 33989; 36511; 36476-77; 48114; 42835; 38735; 48098; 37684; 41638).

2. Exception is taken to the failure to report the following regarding the "processing" of cement referred to in Paragraph 84:

The manufacture of Portland cement involves a complex process requiring over eighty separate operations. Operation of the kilns as continuously as possible is necessary to minimize the expense incident to shutdowns and injury to kiln linings occasioned by cooling and reheating. Such expense amounts to $40,000 a year at a single plant of one of the respondents (Tr. 22521-22; 22530; 22973; 41604-05; 42186; 22705; 27835-37; 26234; 27398; 27998; 46833). See as to size of equipment: Tr. 22710-11; 22724-25; 22582; 22632; 22692; 22694-95; 22698.

Since the adoption of standard specifications each step in the process of manufacture has been vastly improved; the raw materials and the finished product are each ground much finer, which requires more power; the materials are burnt much harder, which requires more coal (Tr. 22648; 22676-77; 22683; 22691-92; 22694-95; 22705-06; 22716; 22750-51; 22754-56; 26292-94).

3. Exception is taken to the assertion that cement mills require a capitalization of 50 cents to $1.00 per barrel of annual capacity on the ground that it is not supported by the evidence. The witness whose testimony is cited, conceded that he did not know anything about the subject

(Tr. 922, 938-39) and the Examiner precluded respondents from proving by testimony of consulting engineers of the federal government and other reliable evidence, that the construction of a cement plant requires an investment or capitalization of between $3.50 and $4. per barrel of annual capacity. Moreover, testimony of Commission's witnesses to the same effect was stricken by the Examiner over respondent's objections (Tr. 31367-68; 31372-73; 2616-17; Resp. Ex. 425 H). The evidence shows that waste-heat power plant equipment adds about 25 per cent to the cost (Tr. 22772-73).

4. Exception is taken to the statement that transportation charges on cement range between 3 per cent and 33 per cent of the cost to the consumer and to the failure to report that transportation charges for cement were shown by the evidence to average about 25 per cent of the delivered cost to the consumer (Tr. 25033-34; 32379; 32392; 36732; Resp. Exs. 1108; 2341; 2343). The total freight charges on the invoices of the single respondent cited in Paragraph 84 (Com. Ex. 2792) amounted to 26 per cent of the total cost and invoices of other respondents show similar percentages. (See, *e. g.*, Com. Exs. 2673-800.)

5. Exception is taken to the failure to report the following evidence regarding cement production and consumption:

The domestic Portland cement industry first developed in the Lehigh Valley because deposits of high grade limestone together with almost the proper proportions of silica and alumina required for the manufacture of Portland cement were found in that region. There are only two or three deposits outside of the Lehigh Valley where these mixtures occur naturally (Tr. 25974; 22522-23; 22537; 22553-54). Efforts to establish Portland cement manufactured in the United States were accompanied by considerable difficulties because the product was low in quality and not uniform. Early attempts to manufacture Portland cement in parts of the country other than the Lehigh Valley were abandoned for all the foregoing reasons. American manufacture of Portland cement involves different materials from those used in the foreign product

and the process is more difficult and more costly (Tr. 22524-25; 22527; 26194-95; 26293-94; Resp. Ex. 411).

The total production of cement mills situated in the Lehigh Valley in relation to the total production in the United States shrunk in gradual stages from 74.8 per cent in 1897 to 28.2 per cent in 1919 and to 18.2 per cent in 1937 because of the construction of new cement plants in areas closer to markets in other parts of the country (Resp. Exs. 3488 A-D; 1108; Com. Ex. 2878 K; Tr. 24579-80; 26564-65; 26583; 26590; 36043-44).

Domestic cement consumption increased steadily from 1920 to 1929 in every Bureau of Mines District, and total domestic shipments in 1928 amounted to 175,838,332 barrels. Total production of domestic plants increased steadily from 335,500 barrels in 1890 to 176,298,846 barrels in 1928 as a result of constantly increasing consumption and demand and the growth of new capacity to meet the demand (Resp. Exs. 3661 A-F; 3488 A-D; 2405; Tr. 26563; 26576; 26700; 33765; 34168-69; 37177-80; 37178-79; 38690; 46731; 46823; 46830; see also exceptions to Paragraph 87, *infra*).

Paragraph 85

1. Exception is taken to the failure to report that eighty-one new cement plants came into existence between 1910 and 1937 (Resp. Exs. 3765 A-C) in addition to the 125 plants shown by the citations in Paragraphs 85 and 86 to have been in operation in 1910. In 1937 there were 161 operating cement plants owned by some 86 separate companies (Resp. Exs. 3764 A-G; 3765 A-C; Com. Ex. 1).

Paragraph 86

1. Exception is taken to the failure to report that the unit basis upon which Portland cement is sold developed many years ago, was adopted by the United States Bureau of Standards and has always been standardized in the specifications for Portland cement issued by the Bureau of Standards (Tr. 22759; Com. Ex. 1112; Resp. Exs. 418; 419; 421; 422; 423).

2. Exception is taken to the statement that "the manufacturer usually sells not less than a minimum carload",

because, although this statement is correct as to some respondents, it is not true as to all; and the evidence shows the following: From 50 per cent to 92 per cent of the total shipments of several respondents moves by truck in less than carload lots (Tr. 30137; Resp. Exs. 2410; 3518; Tr. 34254-55; 42474-76; Resp. Ex. 2112; Tr. 30491; Com. Exs. 2695; 967-6R; Tr. 42880; 8941-42; 36051-52; 35919); and cement moves in small lots by truck in varying percentages from the mills or warehouses of many other respondents (Tr. 32252; 32254-55; 32257-60; 32265; Resp. Exs. 2284-94; 47243; 26883; 6297-301; 25999-6001; 40034; Resp. Ex. 3142; Tr. 40035; Resp. Exs. 3183-Z8; 3325; Tr. 33922-32; Com. Exs. 967-2Z; Tr. 8468; 8512; 8513; Com. Exs. 968-10Y; 11 K; Tr. 38136; 38728; 38720-22; Resp. Ex. 2946; Tr. 37851-53; 37859; 8682-83; 8760-61).

Respondents whose shipments are usually made in minimum carload lots ship that way because their customers do not ordinarily order less than a carload or a mixed carload of standard Portland cement and special cements, limes and plasters; moreover the railroad tariffs set the minimum carload requirements and transportation charges on less-than-carload lots are considerably higher per barrel than the transportation charges on carload lots. Some of the evidence offered by respondents as to mixed carload shipments was rejected by the Examiner (Tr. 9461-62; 26139; 29361; 36680-81; 42232; 47077; 47080-82; Resp. Ex. 3627 C; Com. Ex. 2724).

Paragraph 87.

1. Exception is taken to the use of the misleading expression "surplus production" in Paragraph 87. This terminology does not appear in the references cited nor elsewhere in the evidence. The evidence regarding the relation of capacity and demand, however, shows the following:

Cement capacity has varied from time to time as new mills have been constructed and old mills have been dismantled or discontinued. The capacity of some mills was being increased during the same period that others were going out of business (Resp. Exs. 2405 A-D; 2521;

3745 B; Tr. 34163; 25997; 34170; 46826-28). From 1872 until late in the 1920's cement capacity and production little more than kept pace with the increasing demand; at various times prior to 1930 there have been shortages of cement (Tr. 23036-37; 25996; 46731; 46823; 38926; 27334; 33765; Resp. Exs. 3488 A-D; 411; 3751; Tr. 27672; 34168; 36044-45; 29480-81). Even during the periods of low demand nationally there have been mills in some territories operating at actual capacity (Tr. 34169; 23037; 38927; 28481; 33764-65; 33767; 26232; 34327; 36455; 38137-38; 38133-35; 30484; 38926-27; 17419-20; 27972-73; 27398; 41604; 41700; 42186; 46566; Resp. Exs. 3584; 3488 A-D; 3507; 2405; 3769-81; 3751; 2892 B). The construction of many new mills was begun between 1920 and 1929 to meet the demand for cement, but because it takes two or three years to construct a cement mill, several of the mills which were started when there was an actual shortage were not completed until after the local demand had subsided and the shortage ended (Tr. 46731-32; 27334; 27667; 33761-62; 46830-31; 34169; 42185; 36800; 38926-27; 42185; 36475; 34168; 31182-83; 33765; 33759; 27672; 27669; Resp. Exs. 2520; 3661 A-F; 3745; Tr. 27380; 27667; 27333-34; 8210; 8229-30; 7114; Resp. Exs. 1369; 1418). Many mills have made no additions to capacity since they were constructed. None of them have made any increases in capacity since 1929. With the decrease in demand resulting from the depression in 1930, there was an excess capacity in the cement industry (Tr. 46731-32; 27380; 28479; 38926-27; 36475; 36868; 37185; 38133-34; 30483-84; 36100; 46731-32; Resp. Exs. 1618; 3661 A-F; 3745 B; 3765 A-C; 3508).

Further evidence as to the demand for cement and as to cement capacity and production was rejected (Resp. Exs. 411; 2520; 2521; 2405; 3488 A-D; 3661 A-F; 3745 B; 3769-74; 3765 A-C; Tr. 23020; 23035-37; 34169-70; 38926-27; 36100; 36475; 34168-69; 36868; 46819; 46826-28; 46730-31; 42183-84; 28480; 29480; 33764-65; 33766-67; 27672; 27837; 27669; 46830).

The actual capacity of the industry is considerably lower than its theoretical capacity because no mill can operate continuously at its full daily capacity. Shutdown periods from thirty to sixty days per year are necessary

for repairs and general maintenance work to maintain the maximum efficiency of a mill (Tr. 36455; 41604; 42185; 34327; 28750-51; 27398; 27998; 33763-64; 33767; 31183; 34168-69). During the periods prior to 1930, when most mills operated at maximum capacity, their production did not exceed 80-85 per cent of their theoretical capacity. Moreover, the continuous increase in the requirements of cement specifications have further reduced the effective capacity of all plants (Tr. 22649-51; 26248-49; 28479; 28481; 30483; 33763-64; 33766-67; 34169; 36848-49; 38134-35; 8229; Resp. Exs. 2405; 3661 A-F; 3584).

In addition to requiring capacity which would satisfy the yearly demand if spread out evenly throughout the year, cement plants require stand-by capacity and adequate storage facilities to take care of the peaks in demand which result from a seasonal variation in shipments and variations in demand from one locality to another. Thus, from year to year, in varying degrees, the actual capacity of individual cement plants to produce has often exceeded the demand in the area where its cement has been normally marketed, depending upon the existence or non-existence of the peaks in demand (Tr. 27997; 34326; 37184-86; 37188; 38134-35; 27999-28000; 33765; 26232-33; 22665-67; 22757; 28746-47; 46885; 36454; 34331; 33765; 41605; 42185-86; Resp. Exs. 3769-81; 3745 B-C).

2. Exception is taken to the failure to report that in addition to seasonal fluctuations demand and consumption vary in total volume from year to year and shift territorially from one area to another, fluctuating widely in different sections of the country depending upon agricultural or economic conditions, the existence or non-existence of large construction projects and the rise and fall of general construction in given areas. Buyers or potential buyers of cement are located in all towns and cities of the country (Resp. Exs. 1422; 3558; 3559; 3508; Tr. 26229; 29588; 26593-94; 27835; 27980; 27996-97; 27994; 28753; 34326; 46565; 31169; 31883; 34220; 34326; 37126; 37195-96).

3. Exception is taken to the statements in Paragraph 87 concerning the nature, source, and availability of the materials used in the manufacture of "ordinary" cement

and the factors affecting the location of cement plants, because they erroneously imply that they are applicable to standard Portland cement and because they are inaccurate, incomplete and misstate the references cited. Further exception is taken to the failure to report the following:

To manufacture Portland cement, calcareous and argillaceous materials must be mixed in certain proportions. In a few cases the proper proportions have been found in a single deposit of rock. In most cases mixtures of these materials in the proper proportions have to be made (Tr. 22514; 22531-33; 22704; 36476; Resp. Exs. 415; 418-19; 421-23).

There is very little latitude permitted in the proportioning of the several raw materials. Constant supervision, delicate adjustment, and hour-to-hour chemical analysis throughout the more than eighty separate manufacturing operations are required. In recent years a "blending operation" has been added to the manufacturing process to secure a high degree of uniformity in the chemical composition of the raw materials in process (Tr. 22533-34; 22556; 22760; 22596; 22626; 22704-06; 22723; 22571-72; 22576).

Some raw material deposits, after partial use, become deficient in certain materials which then must be secured from another source; in some instances the method of operation has had to be changed because of the discovery of a change in the proportions of the chemical components or in the character of the materials (Tr. 22534-35; 22537; 22539-42; 22553; 22683-84; 22613-14).

4. Exception is taken to the statement in Paragraph 87 that plant locations are influenced to a considerable extent by pricing considerations. This is contrary to the evidence which shows that plant locations have been determined and influenced by consideration and balancing of the following factors: proximity to markets with adequate transportation facilities to assure the ability properly to serve such markets; availability of the primary and secondary raw materials used in manufacture; and proximity to fuel and power (Tr. 22973; 22636; 22643-45; 22648; 22912-14; 22567; 22960-61; 22711; 34184-85; 46830-31; see also

exceptions to Paragraphs 7-81). However, each is important in itself.

Proximity to and ability to serve markets: This is vital because of the relatively high cost of shipping cement, attributable to its bulk and weight. Ability to compete in service with competitors in those markets requires adequate transportation facilities (Tr. 41601; 33757; 34184; 46831-33; 42183; 31188; 31190; 41961; 36475; 25998-99; see also Exceptions to Paragraphs 7-81, *supra*).

Availability of raw materials: This is of equal importance because of the great quantities required and the large proportion of freight entering into the cost of raw materials. Each barrel of cement made requires the use of over 450 pounds of limestone and over 150 pounds of clay or shale. Heavy plant investment requires that attention be given to the number of years supply of raw materials (Tr. 22551-52; 22636; 25982; 22733-34; 27844; 22533; 33757; 46831; 25978; 27966; 28474; 46833). Usually cement plants have been built on the site of the primary raw material; sometimes a secondary material is found nearby, but sometimes it has to be brought in from some distance; rarely are both primary and secondary materials found together in the proper combinations (Tr. 22535; 22553; 34185; 26600). One of the ingredients which is used to retard the "set" of Portland cement required by the standard specifications is gypsum. There is no substitute for gypsum and its sources are limited; deposits are situated in New York, Virginia, Texas, Oklahoma, Iowa, Michigan and near the Pacific Coast. Sixty to seventy per cent of the cost of this material represents transportation cost (Tr. 22543-44; 22545; 22567-68; 22575-76; 22581-82; 22594; 22598-99; 22612; 22624; 22628-29; 26594; 41960).

The kinds of rock and the working qualities of the material also enter into the problem of plant location. The relative hardness of limestone is important in determining its workability. For example, quarrying operations are and always have been more expensive at plant locations in the Catskill, or Hudson Valley area of New York than in the Lehigh Valley area. [It should also be noted that the fuel cost in the Hudson Valley is higher than

in the Lehigh Valley being about 50 cents more per ton delivered, due to the greater freight.] The Standard Portland cement manufactured at plants in the Catskill area normally costs ten to fifteen cents a barrel more to manufacture than standard cement manufactured at plants in the Lehigh Valley (Tr. 8212-13; 22574-75; 22539; 26302; 26348-49; 22877; 22566-67).

The manufacturing cost at different plants does not vary more than 10 per cent in the overall costs when they are operating at the same rate of capacity. Variation in the cost of manufacturing at a given plant over a given period of time is due chiefly to the rate at which the plant is operated and the fluctuation in the prices of fuel, labor, and raw materials (Tr. 22646-47; 22914; 22933; 22950; 22960-61; 26603; 31180).

Fuel Supply: The fuel supply of a plant is of no less importance than the supply of limestone, clay or shale. The kilns are fired by a highly volatile coal which must be pulverized and blown into the kiln under pressure in order to secure the required temperature of 3,000 degrees Fahrenheit. In the average cement plant the burning of each barrel of cement weighing 376 lbs. requires the consumption of over 100 lbs. of special coal when operations are at full capacity (Tr. 22566; 22726-27; 22716; 22575; 22581; 22637-38; 22710-11; 22598; 22732). There are about half a dozen coal fields situated in scattered areas throughout the United States, which produce the coals that are necessary for this operation, viz.: West Virginia, western Pennsylvania, southern Illinois, Alabama, Kentucky, Colorado and along the Pacific Coast. Thus, coal frequently has to be transported from great distances, *e. g.*, the nearest source of a suitable fuel available to plants situated in the Lehigh Valley is 350 to 400 miles distant. Such coal costs about $4.00 per ton delivered, about 70 per cent of which represents the cost of freight (Tr. 22566-67; 22574-75; 22581; 22636; 22638; 22773; 22729; 22932-33; 26594-95). The availability of power at satisfactory rates is another important cost factor. In a typical mill, power consumption amounts to

30 kilowatt hours per barrel of cement produced (Tr. 22636; 22893; 22728-29; see also Exceptions to Par. 208).

5. Further exception is taken to the failure to report that many cement plants which are not well built or well located have been abandoned (Tr. 22917; 22633; 22642; 26574-75; 26577-78; 26601; 25975-76; 25997; 22527; 26584; 34170-71; 34163; 42188; 46826-28; 23020; Resp. Exs. 2521; 2405 A-D); and that the mills operated by Respondents are economically located, modern and efficiently operated (See Exceptions to Paragraphs 7-81, *supra*). Further evidence as to location, improvements and efficiency of respondents' mills was rejected by the Examiner (Tr. 29589; 25978; 27844; 28474; 34419-20; 36100; 42183-85; 31218; 31148; 41960; 25978; 27965-66; 41602; 36475-76; 33757-59; 46831; 46834-35; 22710; 22715-16; 26600-02; 26604; 36803-04; 37181-82; 38738; 46822-23; 46819; 37480-81; 36867-68; 46888-89; see also exceptions to Paragraphs 208-209, *infra*).

6. Exception is taken to the statements contained in Paragraph 87, relating to the demand for cement and the proportion of cement required in relation to other structural materials in various types of buildings on the ground that these statements do not correctly report the evidence cited or other evidence on the subject. Exception is further taken to the failure to report that the percentage cost of cement used in various types of construction, in relation to the total cost of construction, is as follows (Tr. 47528-32; 13748):

Type of Construction	*Percentage Cost of Cement Used (Average)*
Dwellings and apartment buildings	2% to 3%
Reinforced concrete warehouses, factories and mills	5%
Other industrial and commercial buildings	4%
Subway construction	2%
Tunnels, water supply systems and shafts	5% to 6%

Type of Construction	*Percentage Cost of Cement Used (Average)*
Reinforced concrete bridges	8% to 9%
Dams	6% to 7%
Highway construction	6% to 15%
Underpasses, viaducts, stadia, canals, sewerage, and grade crossings	5% to 6%

The cost of the "aggregates" (sand, gravel, crushed stone, et cetera) used in concrete construction exceeds the cost of the cement used. Portland cement is the lowest priced fabricated product in the world (Tr. 47528-32; 13748). The evidence shows that reduction in the price of cement does not increase consumption (Tr. 36762-63; 36797; 37292; 37294; 26133; 38750-51; 40061; Resp. Exs. 3663-70).

Further evidence as to the percentage cost of cement in relation to the total cost of construction was rejected (Resp. Exs. 3741 for id.; 3742 A-B for id.; 3768 for id.).

7. Exception is taken to the statements in Paragraph 87, concerning competitive materials and substitutes for cement on the ground that respondents were precluded from introducing evidence on the subject (Tr. 29049-50; 36758).

"The Basing Point System"

Paragraphs 88-92[1]

Section I[2]

1. General exception is taken to that portion of the report entitled "The Basing Point System" (Paragraphs 88-92) for the following reasons:

It does not fairly report the evidence bearing upon and describing the several ways in which the various respondents have determined their prices for cement during the period of the complaint (See Section II, *infra*, Exception No. 12; also exceptions to Paragraphs 130-138; 151-158, *infra*).

By generality of statement and the adoption of controversial and ambiguous phraseology (*i. e.*, "system", "formula", "governing price", "controlling price", "phantom freight", etc.), it provides the basis for conclusions and implications regarding the evidence (more specifically set forth below, Exceptions Nos. 2-10) which are not supported either by the evidence cited or "throughout the record" as implied in Paragraph 88 of the report.

On the basis of selected excerpts from statements in the testimony or in exhibits by representatives of *seven* respondents (citations in Paragraph 88), without reference to the substance of the evidence adduced in behalf of each respondent, it erroneously imputes to all seventy-five corporate respondents "in all trade territory", the universal, country-wide and all-time use of a "system" of pricing, referred to as the "basing point method" (See Section II, *infra*);

It does not report on the evidence explaining the origin and growth of the various methods employed in the determination of cement prices, which evidence is indispens-

---

[1] Exceptions to Paragraphs 88-92 are set out in two sections. Section II, immediately follows Section I.

[2] To avoid duplication, many citations in support of Section I of Exceptions to Paragraphs 88-92 are stated only in Section II.

able to any unbiased attempt to understand and judge the basis, operation, and effect of the various means used to determine prices (See Section II, Exception No. 3; and exceptions to Paragraphs 131-138; 151-158, *infra*).

2. Exception is taken to any implication, expressed or intended by the use of the word "system" in Paragraphs 88, 91, and 92 that the use of basing points, where and when used, is the result of any agreement, understanding or collusion between any two or more respondents; that the use of basing points is part of any automatically operated plan or reciprocal arrangement among any two or more respondents; or that the use of basing points flows from non-independent action by any respondent. There is no support for such implication or suggestion in the evidence cited by the Examiner or elsewhere in the record; the evidence is overwhelmingly to the contrary (See Section II, Exception No. 4, *infra;* also exceptions to Paragraphs 7-81, *supra*).

3. Exception is taken to the implication in Paragraph 88 that basing points are employed in the determination of prices by all respondents or by all producing respondents. Exception is further taken to the failure to report that executives of several respondents testified that they do not use basing points for any of their prices (Tr. 8939; 8959; 9082-83; 42879; 39962; 42448; 42708) and that the evidence shows that no respondent used basing points for all its prices (See exceptions to Paragraphs 7-81, *supra*).

4. Exception is taken to any implication in Paragraph 88 that prices are determined by the use of basing points in "all trade territory" on the ground that such implication is not supported by the evidence cited or, as reported, "throughout the record".

5. Exception is taken to any implication in Paragraph 88 that cement prices consist of two definite patterns, those in which a basing point method is employed and those which are zone prices and to the failure to report the evidence concerning the flexibility and variation in the character and

kind of prices quoted by producing respondents (See Section II, *infra;* also exceptions to Paragraphs 130-138; 151-158, *infra*).

6. Exception is taken to any implication in Paragraph 88 that all respondents or any of them quote or have quoted delivered or destination prices exclusively. Exception is further taken to the failure to report that all cement is not sold at delivered prices, and that numerous f.o.b. mill sales have been made by almost all respondents during the entire period covered by the complaint and thereafter (Tr. 40284-90; 47667; 38940-41; 35636; 6617; 28003; 28371; Com. Ex. 3143 i; Tr. 46985; 39850; 39909; 40057; 40071; 38936-37; 32660; 32663; 38699-700; 38788; 38809; 38764; 38801; Resp. Exs. 3721-26; Tr. 38141; 30523-24; 36122; 36124; 36357; 33000; 35276; Resp. Exs. 3386 A-H; for further references see citations to Exception No. 1, Section II, *infra*; exceptions to Paragraphs 7-81, *supra*; and exceptions to Paragraphs 131-138, *infra*).

7. Exception is taken to any implication in Paragraph 88 that the use of multiple basing points was or is responsible for the use of destination or delivered prices on the ground that it is not supported by the evidence (See Exception No. 3, Section II, *infra*).

8. Exception is taken to the implication in Paragraph 88 that delivered or destination prices for cement are always the product of a so-called base price and rail freight charges from some basing point to destination; and to the failure to report that the evidence covering all trade areas in the country is to the contrary (See: *e. g.* Tr. 47614-15; 35644; 30828; 26084; 36340-41; 36812; 31223; 26672-73; 40046-48; 40056; 37122; 37427; 42191-92; 28394-95; 8260-61; 38144-45; 37692; 21677-78; 37644-45; 35903-05; See also Section II, Exceptions Nos. 1 and 2, *infra;* also exceptions to Paragraphs 7-81, *supra*).

9. Exception is taken to the implication in Paragraph 88 that there are few basing points and the assertion in Paragraph 89 that one-third of the mills operated are regarded as basing points. Both are contrary to the evi-

dence. Exception is further taken to the failure to report the following:

The evidence shows all the basing points and so-called base prices used by various respondents during the past 20 years. The number of basing points has never been constant, but has increased from a few points in 1910 to as many as 116 points in 1936 representing 75 per cent of all cement plants in the United States; and less than 10 per cent of the cement capacity of the country is more than 50 miles from some basing point: This evidence is uncontradicted and unchallenged (Resp. Exs. 3745 A-B; Tr. 23240; Resp. Ex. 1109; Com. Ex. 3205).

10. Exception is taken to the unsupported implication in Paragraph 88 that basing points are discoverable by finding quoted prices at any two points or as few as two points, and to the failure to report that the evidence shows that the prices at many destinations, including all principal markets, are always analyzed (Tr. 5127-28; 27183; 27186-88; 35299; 36635; 39854-55; 23177; 32335; 35912; 36814; 40514-16; 28763; 31222; 28010-11; for further citations, see Section II, Exception No. 10, *infra;* and exceptions to Paragraphs 7-81, *supra*).

11. Exception is taken to the ambiguous expression "governing price" in Paragraph 89 as, contrary to the evidence, it implies lack of freedom on the part of any respondent to quote and sell at any price it chooses. Exception is further taken to the failure to report the great body of evidence explaining and describing the various competitive conditions which bear upon and determine market prices for cement, including the nature of the product as well as the nature, location, power and sophistication of buyers, and the fact that prospective buyers always compare delivered costs, all of which shows the resulting necessity for meeting the lowest price found in a given market (See Section II, *infra*).

12. Exception is taken to the implication in Paragraph 89 that all destination prices are the lowest combination of

a so-called base price plus freight. This is contrary to the evidence and is not supported by the references cited (For further exceptions and citations see Section II, *infra;* also Exception No. 3, Section I, *supra*).

13. Exception is taken to the implication in Paragraph 89 that the lowest combination of base price plus freight in any sense "governs" destination prices. This is contrary to the evidence and not supported by the references cited. Exception is further taken to the failure to report fairly and completely on the mass of evidence explaining and describing the manner and extent to which basing points are established and used in connection with the determination of prices (See Section II, *infra*).

14. Exception is taken to the erroneous implication in Paragraph 89 that the change in status of a given mill from base to non-base or vice versa is discoverable by some means or method other than independent analysis by each company of all new prices. Exception is further taken to the failure to report that such analysis has constituted the only means of obtaining such information (For citations see Section II, Exceptions Nos. 10, 14, *infra*).

15. Exception is taken to the terminology in Paragraph 89 "application of the basing point factors", on the ground that there is no basis in the evidence for such terminology and no explanation or description in the report or in the evidence of the expression "basing point factors".

16. Exception is taken to the incomplete and arbitrary selection of references cited in support of Paragraph 89 in that they are not representative or typical of the evidence on the subject matter insofar as it relates to the eight respondents mentioned in such references and they in no way involve the other *sixty-seven* producing respondents.

17. Exception is taken to the definition of mill net in Paragraph 90 as "gross delivered price less freight";

there being no evidence to support such definition and none cited. Exception is further taken to the failure to report that the meaning of the term mill net varies among different respondents depending on their individual accounting practices; that in most cases mill net is determined by deduction not only of transportation charges, but discounts, package charges; and in some cases other costs (Tr. 40041; 25993; 23298; 27693; 27974-75; 28739-40; 38705-06).

18. Exception is taken to the use of ambiguous, controversial and misleading terminology in Paragraph 90 (*i. e.*, "prevailing price", "controlling price", "prices controlled") because it implies agreement, understanding or collusion among respondents regarding price, there being no evidence to support the use of such terminology or to support such implications and none cited. Exception is further taken to the failure to report the evidence on behalf of each respondent negativing the existence of any such agreement or understanding (See exceptions to Paragraphs 7-81, *supra*).

19. Exception is taken to the expression "territory controlled by its base" in Paragraph 90 because it implies agreement, understanding or collusion among respondents regarding the area where price b. es may or may not be effective or implies rigidity and fixity of such areas, there being no evidence to support such implications and none cited. The only evidence is to the contrary (Tr. 37122-23; 38144; 28018-19; 33818-19; 26086; 6627-28; See also Section II, *infra*).

20. Exception is taken to the implication in Paragraph 90 that all sales are made at a profit within the area where a base mill has lower freight rates to all destinations than any other mill, there being no evidence to support such implication and none cited. Evidence regarding costs and profits offered on behalf of the respondents was rejected by the Trial Examiner and the subject was allegedly excluded from consideration in the case (Tr. 48087; Resp. Ex. 3787; Tr. 32062; 30489; Resp. Exs. 2185 A-D; 2186 A-D; Tr.

31253; 38392; 38664; 38666; 38673; 38675; 38677; 32959-65; 32330; 33886; 32326; 38850; 41456; 26396; 33606-09).

21. Exception is taken to the implication in Paragraph 91 by the use of the word "formula" as synonymous with the expression "basing point method", that the basing point method to the extent employed is a prescribed, set or fixed method or prescription in any sense of those terms, there being no evidence in the record to support such implication, and none cited.

22. Exception is taken to the implication in Paragraph 91 that, having discovered a constant or base at a given point, the operators of all base mills automatically use such base in the determination of all prices, without regard to actual prices independently ascertained at each market. Such implications are not supported by the evidence. Exception is further taken to the failure to report that the evidence shows that each company is interested solely in the prices at all destinations where it sells and always checks such prices constantly in an effort to meet competition (Tr. 30547; 36636-37; 32531-36; 38797; 21671-72; 8939; 37693-94; see also Section II, Exception No. 8, *infra*; and exceptions to Paragraphs 7-81, *supra*).

23. Exception is taken to the implication in Paragraph 91 that the contents of the entire paragraph are applicable to all mills which are or have ever been operated as so-called non-base mills. Exception is further taken to the failure to report the following: only a few non-base mills, which are purely price followers meeting the lowest prices found, have from time to time been in a particularly advantageous price position, *i. e.* located distant from the nearest effective price leader. Such cases are rare because less than 10 per cent of the cement capacity of the country is located more than 50 miles from some basing point (See Exception No. 9, *supra;* also Exceptions to Paragraphs 7-81, *supra*) and because freight absorption by a non-base mill obviously increases twofold outward from its mill in that its net is decreased not only by the additional freight incurred from its mill to destination, but also by the lessening freight from the base mill to that destination.

24. Exception is taken to the assertion in Paragraph 91, without qualification or specification, that the freight from all basing points to destinations in the vicinity of non-base mills is considerably greater than the freight from the non-base mills to the same destination. Exception is further taken to the failure to report that over 90 per cent of the total cement capacity of the country is located within 50 miles of some basing point (See Exception No. 9, *supra*).

25. Exception is taken to the implication in Paragraph 91 that non-base mills charge and receive a transportation charge not actually incurred in the shipment and to the failure to report that on all sales at delivered prices the actual freight from the actual shipping point to destination is invoiced to the customer with certain exceptions not here pertinent (See Com. Exs. 2631-2805).

26. Exception is taken to the terminology "phantom freight" in Paragraph 91 in so far as it implies that cement purchasers are charged and pay directly or indirectly, a non-existent transportation charge on rail shipments. Exception is further taken to the failure to report that the evidence is directly to the contrary including the evidence cited in support of Paragraph 91 (See particularly Com. Ex. 2850 C, first complete sentence; also Com. Exs. 2631-2805).

27. Exception is taken to the implication in Paragraph 91 that freight earned by any railroad is paid by purchasers of cement to a recipient other than the railroad so earning it and to the further implication that this phenomenon attends all cement pricing by all respondents. Neither implication is supported by the evidence.

28. Exception is taken to the generalized terminology "the non-basing mill" in Paragraph 91 in so far as it fails to particularize the mill or mills to which the statement purports to apply, and in so far as it implies or is intended to imply a universal or all-inclusive practice of all mills or all non-base mills.

29. Exception is taken to the terminology "controlling base" in Paragraph 91 in so far as it implies rigidity,

domination, regulation, understanding, agreement or collusion regarding either the use or non-use of a given base in the determination of particular prices or the area in which prices may or may not reflect such base. Exception is further taken to the failure to report that the evidence contradicts such implication (Tr. 26085-86; 28018; 41616-17; 33819; 36340-41; 42377; 6166; 36482; See also Exception No. 19, *supra*; and Section II, *infra*).

30. Exception is taken to the assertion in Paragraph 91 that there is a "system" of delivered prices and to the implication that a system of prices is "maintained" in so far as such terminology implies any agreement, understanding or collusion among respondents regarding the use or non-use of delivered prices; or any non-individual action by any respondent regarding the prices and the nature of the prices that it would quote, there being no evidence and none cited to support such implication. Exception is further taken to the failure to report the overwhelming evidence not only denying such implication (Tr. 24887; 23169-70; 23206-07; 13742; 26127; 26930-31; 34663-64; 39035; 39046; 39051-52; 40056; 39705-06; 28170; 28005; 28203; 28357; 34001-02; 37605-06; 29582-83; 5085; 10595; 35805-06; 46780; 46988; 46921; 46937-38; 47110; 47900; 47912; 29543; 30049; 30115; 30096; 39851; 32104; 32227; 34663; 38705; 38782; 38144; 30788; 30579; 30593; 30716; 36125; 36335; 41815; 28519; 37123; 36026; 41617; 29515-16; 32098; 41714; 42005-06; 29037; 39240; 38636; 35979; 29597; 42853; 47758; 47638-39; 47642; 47651; 47657; 57629), but explaining fully the use or non-use of delivered prices by the individual respondents and the growth, history, development and attending circumstances of such use (See Section II, Exception No. 4, *infra*).

31. Exception is taken to the assertions in Paragraph 91, unsupported by any evidence, that an "extra price" is obtained by non-base mills and that such "extra price" enables such mills to balance sales and output by greater absorption of freight to distant points.

32. Exception is taken to the failure to specify and support by reference to the evidence which respondents

are referred to by "producers", "they", "respondents" and similar generalizations in Paragraph 92.

33. Exception is taken to the unsupported general conclusion in Paragraph 92 that the basing point method is "generally observed in the cement industry" and to the failure to report the evidence explaining the various pricing methods which have been used by respondents (See Section II, Exception No. 1, *infra*). Exception is further taken to the implication in Paragraph 92 that preceding paragraphs of the Report accurately or completely describe the basing point method employed by any respondents, and the nature and extent of such employment (See Exceptions Nos. 1-31, *supra*).

34. Exception is taken to the assertion in Paragraph 92 that "all prices outside of zoning areas" are assumed to conform to a basing point pattern, there being no evidence to support the assertion and none cited, and to the failure to define or describe the expression "zoning areas" (See Exception No. 5. *supra*).

35. Exception is taken to the unwarranted use in Paragraph 92 of "assumption" as synonymous with "understanding". Such use is not supported by the evidence and amounts to usurpation by the Examiner of the Commission's function to decide the ultimate issue of conspiracy.

36. Exception is taken to the implication in Paragraph 92 that the figure (or so-called base price) used at a basing point is the price at which cement is sold unless such implication is limited to sales which have been made f.o.b mill at that figure. Exception is further taken to the failure to report the evidence that except on f.o.b. mill sales the price for cement is the delivered price (See exceptions to Paragraphs 7-81, *supra;* 224, *infra*).

37. Exception is taken to the use of quotation marks around the expression *meeting competition* in so far as they qualify, limit, or otherwise alter the accepted and established meaning of that expression. There is no support in the evidence for such qualification or limitation and none cited. Exception is further taken to the failure

to report on the voluminous evidence explaining and describing the necessity for and means by which competition is met by respondents (See Section II, Exceptions Nos. 5, 6, 7 and 8, *infra*).

38. Exception is taken to the unwarranted adoption by the Examiner in Paragraphs 92 and 92 (i) of the expression "matching prices" and "price matching" used not in the evidence but continuously and advisedly in statements by Commission Counsel throughout the hearings to suggest price fixing.

39. Exception is taken to the description of the matters reported in Paragraph 92 (a)-(i) as the "settled philosophy and policy in the trade" there being no support in the evidence and none cited for such characterization, and on the further ground that objection to attempts by Commission Counsel to develop such characterization was sustained as improper evidence (Tr. 13750-51). It is conceded, however, that the uncontradicted evidence shows the matters reported in Paragraphs 92 (a), (d) and (e) to have been established as facts existing in the cement industry, and not as matters either of philosophy or policy.

40. Exception is taken to the failure to report in Paragraph 92 (c) that the assertion there stated as fact was the opinion of a representative of *one* respondent not shown by the evidence to have been held or adopted by any other respondent, and to the failure to report that that opinion was based wholly on his conception of the illegality of secret price cutting under the Robinson-Patman Act (Tr. 6635).

41. Exception is taken to the failure to report in Paragraphs 92 (c) and (d) that sales are constantly taking place at prices lower than the published prices of the various companies and that almost every respondent has participated in that practice (See Section II, Exception No. 7, *infra*; also exceptions to Paragraphs 7-81, *supra*).

42. Exception is taken to the implication in Paragraph 92 (f) that uniform policies are pursued by all respondents, and to the failure to specify and identify what

"policies" are referred to. Exception is further taken to the failure to report that, generally, the marketing policies of companies competing in the same sales area tend toward uniformity, and that the marketing policies found in different sales areas have often differed (See exceptions to Paragraphs 139-150, *infra*; also exceptions to Paragraphs 7-81, *supra*). Exception is further taken to the erroneous implication not supported by evidence that there is a purposeful and collective intent to achieve uniformity, and that this purpose is to prevent price cutting by dealers, and to the failure to report the evidence explaining the causes for the tendency toward uniformity in a given sales area and the competitive conditions which make it inevitable (See exceptions to Paragraphs 139-150, *infra*).

43. Exception is taken to the failure in Paragraph 92 (g) accurately to report the evidence regarding f.o.b. mill selling and to the implication of restraint contained in the use of the words "should not" in this paragraph and in Paragraph 92 (h). (For citations and further exceptions see exceptions to Paragraphs 130-138, *infra*; and Exceptions to Paragraphs 7-81, *supra*).

4. Exception is taken to the failure in Paragraph 92 (h) to report the evidence regarding the reductions in prices and quantity discounts given to the United States Government and others and to refer to the uncontradicted evidence that the United States Government has received prices lower than commercial market prices on every large cement project since 1933. On all federal projects where substantial amounts of cement have been involved, the United States Government has always been given special reduced prices. This was the case, for example, on *Boulder Dam* (Com. Ex. 135; 1225; Resp. Ex. 292), *Grand Coulee Dam* (Com. Exs. 111 F; 277 N; 112 D; 2366 A; 114 A; 967-2 G), *Conchas Dam* (Com. Exs. 176; 1213 B), *Bonneville Dam* (Com. Exs. 159-23; 162; 2097), *T.V.A.* (Com. Exs. 401-02; Tr. 2163-64), *Muskingum Dam* (Tr. 37914; 37995), *Tygart River Reservoir* (Com. Exs. 178 B; 178 C; item M), *Parker Dam* (Com. Exs. 124 A; 124 B; Par. 8; 1225; 1308); *Truckee Storage* (Com. Exs. 120 B; 2051 B;

Resp. Ex. 276 for id.) and *Fort Peck Dam* (Com. Exs. 874 N; 164 B; 164 i; 165; 166; 168; 169; 1213 B). See also Section II, Exception No. 7.

Exception is further taken to the failure to report the following evidence regarding sales to the United States Government:

Most respondents have found that changes in the proportion of their sales to public authorities have not affected their selling costs. (Com. Exs. 976-12 V, 3 Q; 970-5 E; 969-8 Q; 970-10 Y; 975-13 H; 969-11 i; 969-13 S; 14 F; 976-14 H; 969-10 S; 976-11 B; 967-7 A; 969-13 B; 970-1 M; 969-6 Y; 7 N; 969-15 C; 975-18 X; 969-3 N; 975-6 S; 967-16 V).

Many respondents have found that the cost of supplying federal government requirements is greater than that of supplying the normal requirements of day to day trade. Moreover the federal government, so far as most respondent companies are concerned, is a very small customer (Tr. 27561-62; 27744; 30597; 30606-07; 30624-25; 32331; 31195-99; 32774; 38148-49; 38732; 38963-64; 42192-93; 42263-68; 46529; see also exception to Paragraphs 7-81, *supra*). Further evidence to this effect was rejected by the Trial Examiner (Resp. Exs. 3433 A-Y for id.; Tr. 30605-06; 32330-31).

45. Exception is taken to the inference in Paragraph 92 (1) that truck delivery of cement is collectively restrained or has been abandoned by all respondents or in all parts of the country. (For citations and further exceptions, see exceptions to Paragraphs 120-122, *infra;* also exceptions to Paragraphs 7-81; *supra*).

Paragraphs 88-92

Section II

Exception is taken to the failure to report the following:

1. There are various methods by which respondent producers determine the prices at which they sell their cement, and such methods have differed not only through

the period covered by the complaint, but also among individual respondent producers and among the several areas where cement is sold (Tr. 4487; 23989-90; 32514-16; 6763; 35644; 35820; 3057; 26083-84; 36338-42; 36345; 33488-89; 36812; 31223; 31230; 31202-03; 26822-23; 27135-38; 26672-73; 27139-40; 6532-34; 40048; 40589-90; 4557-58; 40253; 37382; 37428; 42191-92; 28174; 28378-79; 33865-66; 38487-88; 38144-45; 38793-94; 34833-34; 35285-86; 31933-34; 33003-06; 38634-35; 27728; 27871; 28530; 35903; 24965-66; 35820; 6530-31; 6592; 6598-99; 42388-89; 9081-82; 13534; 30037; 47615; 33076; 30040; 32093; 34437; 34345-46; 34264; 38746; 25419-24; 36482; 42381-83; Resp. Exs. 2500; 2011 A-E; 2401; 1159).

Some respondents determine their respective prices by setting a figure at their own mills, adding the applicable package and freight charges and quoting the result as their delivered prices, except where they find any of such prices to be higher than prices quoted by some other seller for the same destination; in the latter case they meet the lowest prices found, or, where they cannot afford to meet the lowest price at a destination, they abandon the market (Tr. 23052; 8684; 8694-95; 36812; 31228-30; 26671-72; 37122; 8126; 38485-86; 34831-32; 4075; 47614-16; 38142; 8617-18; 37966; 42381; 34832; 34838; 39962-63). This has been commonly referred to as the so-called "basing point method". It is only one form of selling at delivered prices and is not the method employed by any or all respondents (Tr. 23052; 8684; 8694-95; 36812; 31228-30; 26671-72; 37122; 8126; 38485-86; 38144-45; 23847; 26822-23; 37382; 47614-16; 33076; 34647; 34651; 38142; 8617-18; 24528-29; 37966; 42381; 34832; 34838; 39962-63; Resp. Ex. 1159; Com. Exs. 455; 2878 B-C). The so-called basing point method has not been employed by all respondents (Tr. 8939; 8959; 9082-83; 8612-18; 42448; 42708; 42879).

Other respondents have a policy of merely meeting the lowest prices found at the destinations where they sell (Tr. 25492; 24328-29; 25833; 13639-40; 13596; 39851; 13458; 35639; 35643-44; 7556-57; 30547; 41615; 12442-43; 31307-08; 27108-09; 39962-63; 37120; 37122; 42381; 28004;

28014; 28205; 28416; 28419; 8256; 36481; 36636-40; 38601; 38748; 37693-94; 34838; 27714; 26101-02; 26383-84; 32508-09; 25443-44; 46986; 47891; 47930; 30018; 29407; 33283; 47586-87; 34337; 38833; 38141-42; 30532; 36343; 36125; 36127; 13297; 39628; 36860; 40045-46; 40061-62; 40075; 40527-28; 42014; 38022; 38026; 37690; 38944-45; 11172-73; 28769; 28773; 47660; 35901; 35905-06; 29675; 8713; 11386-87; Com. Exs. 971-19 V; 970-1 Q; Resp. Ex. 1996).

Some respondents have quoted zone prices either generally or in some particular area (Tr. 23061; 24516; 31298-99; 31302; 31230; 26823-24; 4487-89; 6297-98; 40589-90; 13522-24; 34926; 30772-74; 23138-39; 23142-43; 37382; 8886-87; 32536; 32518-20; 38819-20; 38746; 37428; 35285-86; 38793; 42383; 27139; 8425-26; 8034; 35903; 38487-88; 8890-91; 37692; 40253; 40046-47; 26672-73; 32514-16; 33150; 30037; 32093; 21677-78; 40038; 42436; 35905; 34833; 13523; 42460; 42507; 11098; 11225-26; Resp. Exs. 2000 A-E).

Some respondents have quoted prices radiating from their own mill or from a given market area, which did not reflect actual freight rate differences (Tr. 6042-43; 6530-31; 6532-34; 6765-66; 6812; 27448; 7348-49; 26828; 26672-73; 4491-92; 3938; 32514-16; 8425-26; 27874-75; 24528-29; 34835-36).

Some respondents have in varying degrees quoted prices which did not reflect any relation to one another or to any of the prices of competitors (See Exceptions to Paragraphs 7-81, *supra*).

Almost all respondents have quoted f.o.b. mill prices generally or on one or more kinds of business (Tr. 35636; 6617; 28003; 28371; 46985; 39850; 39909; 32660; 32663; 38699-700; 38749; 38788; 38809; 38141; 30523-24; 36122; 36124; 40057; 40071; 40284-90; 47667; 38936-37; 38940-41; 33000; 35276; 9323; 11269; 33677-78; 42469; Com. Ex. 3143 i; Resp. Exs. 3178-80; See also Exception No. 1 to Paragraphs 130-138, *infra*; and exceptions to Paragraphs 7-81, *supra*).

2. The several methods of determining prices used by individual respondent producers have varied in response to varying commercial and competitive conditions in the different markets and sales areas (Tr. 35820; 33488-89;

6530-31; 6592; 6598-99; 37428-29; 42388-89; 38487-88; 38819-20; 38635; 33003-05; 35903; 23847; 26822-25; 37122; 37382-83; 38485-86; 3739; 4491; 23850-51; 26953-54; 24788-89; 6042-43; 6532-34; 6765-66; 6812; 27448; 7348-49; 24532; 3938; 23057-58; 23061; 23138-39; 23175; 30774-75; 31230; 28071-73; 13524-25; 34834; 34925; 23141-43; 47615; 33076; 30040; 47614-16; 33150; 34264; 34647; 32093; 38754; 38144; 34651; 38299-301; 30774-75; 24528-29; 36769; 36996; 40073; 40050; 42381-82; 39593; 39679; 34837; 34834; 8684; 8694; Com. Exs. 971-[illegible]; Resp. Exs. 456; 2011 A-E; 2401; 1159).

3. Delivered prices are used extensively by most respondents. They originated historically and naturally more than thirty years ago. Their origin, through the increasing keenness of competition and rapid expansion of the domestic industry was described by one witness as follows (Tr. 26625):

> "In the early days of the distributor relationship the sales were at f.o.b. mill prices. The commitments from the distributors to ourselves were definite commitments and the distributor was at perfect liberty and did sell as he could, for whatever measure of profit he could get.
>
> "This situation, however, changed materially as new plants were built throughout the territories. There was an increasing number of cases in which the distributor found himself faced with local competition which he couldn't meet by taking the cement for which he had committed himself at a definite price.
>
> "In such cases he came back to the Lehigh Company to negotiate a special price or some adjustment or concession that might enable him to meet the competition in that particular case, and because the distributor would, if no such adjustment had been made, have been unable to make the sale and the Lehigh Company would have lost the tonnage, there were frequent adjustments of that kind.
>
> "Cases of this sort multiplied quite rapidly, and under the pressure of this development the distributor, in an increasing number of cases, was selling the Lehigh cement at destination under prices that were arranged between himself and the company,

in order to deal with the individual competitive situations.

"The distributor, in many cases, made his sales f.o.b. destination although the price made to him by the Lehigh Company continued, for the most part, to be an f.o.b. mill price.

"The point is that that period was a period of transition in which there was a very sharp change from the original method of outright commitment and resale to a point where the prices were fixed to meet the local competition by arrangement between ourselves and the distributor" (R. pp. 26622-23).

" • • • Perhaps an example may clarify the situation.

"Let us say that we were selling a distributor at the price of 80 cents f.o.b. mill. The distributor's freight rate to an important market in his territory was 50 cents per barrel. That gave him a cost at destination of $1.30 to which his profit had to be added.

"He found he could sell in that market a substantial quantity of cement. That in order to do so, to meet the competition in the market, he would have to sell this cement at $1.20. The distributor came to us and said: 'I can make a sale, but I can't make it at the price that I have got. I won't be able to take my commitment from you unless you have an adjustment whereby I can meet that competition', whereupon in many cases, such an adjustment was made if the business seemed sufficiently desirable, and whether that reduction was made, as it was in some cases, by reducing his f.o.b. mill prices, or whether it was made, as it began to be made in an increasing number of cases, by giving the distributor an f.o.b. destination price, the fact remains the adjustment in every case was made in order to meet a competitive situation existing at the destination."

(To the same effect, see Tr. 26069-70; Resp. Exs. 404 A-P; Tr. 23045-46; 23047-48).

Prior to 1909 the use of delivered prices was wide spread, and the desire of the purchaser to buy on the basis of delivered cost at destination in all sections of the country

had long since been apparent before that time (Tr. 24934; 27190-97; 13580; 26069-70; 23044-48; 23067; Resp. Exs. 432-34; Tr. 26618-30; 13034-35; 34919-20; 34861-62; 32631-32; 33216; 32658-59; 32654-55; 36877-79; 36830; 46484; 42204-05; Com. Exs. 2878 K-L; Tr. 35875-79; 33216; 32651-52; Resp. Ex. 3788, p. 100).

Cement was sold in some instances, f.o.b. mill with the freight costs to point of delivery in cents per barrel set forth in the quotation made by the manufacturer (Tr. 23046-47; 23097; 32652; Resp. Exs. 432; 434; 436).

4. Executives of respondents appeared as witnesses and testified that their companies had no agreement or understanding and had taken no collective action regarding the use of basing points in the determination of prices (Tr. 10595; 35805; 23847; 47900; 29515-16; 39851; 34663; 38144; 36334-35; 36125; 27173; 39706; 39632; 28357; 34001-02; 38675; 38636; 37605-06; 37638; 36026-27; 47759; 48101-07; 37605-06; 42447; 47629; 39035; Com. Exs. 971-24 F); or the use of delivered prices (Tr. 24887; 46988; 46779; 47035; 35805-06; 39046; 39051; 39052; 39705-06; 47912; 39851; 39820-21; 41714; 42005-06; 29037; 39141; 39240; 37501; 38636; 35979; 46536; 13742; 47633; 29597; 42853; 47758; 47638-39; 47642; 47651; 47657; 47629); and by testimony and exhibits showed that they were completely and individually free to use any price they individually chose, or any method of determining their prices (Tr. 13742; 47633; 41617; 19546-47; 41815; 41733-34; 41620; 41673; 34663-64; 33150; 39035; 40056; 40049; 40060; 37123; 37221; 37305-06; 37329; 28005; 28357; 28170; 28203; 34001-02; 33869-70; 26127; 10595; 5085; 38636; 39851; 39864; 42022-23; 28761-62; 28764-65; 28775-76; 29159; 39235; 39141; 39165; 8903; 47661-62; 37638; 37605-06; 37522-23; 39705-06; 39795; 39652; 39632; 26442; 48103-04; 48101-07; 37605-06; 23169-70; 23206-07; 23376; 23847; 23858; 46937-38; 47023; 46780; 46988; 46921; 47110; 47147; 35805-06; 26930-31; 27173; 36546; 36504; 36483; 36490; 37741; 37795; 29582-83; 29567-71; 12257; 47759; 47758; 47900; 47912; 47893; 27449; 27471-72; 27518; 36026; 29543-44; 30049; 30115; 30096; 30039-40; 30061; 30113; 30170; 30171; 32104; 32227; 32101; 34230; 34248; 38705; 38782; 38144; 38301;

30788; 30579; 30593; 30716; 30792; 30809; 36125; 36285; 36334-35; 27852; 27853; 27720; 27866; 27818; 28519; 42085; 42364-65; 36494; 47639; 47642-43; 47651; 42854; 42447; 47629; 11391; 33666; 34801; 34830; Com. Exs. 974-24F).

5. Because cement buyers will not pay more at the point of delivery for one brand of cement than they will for another (Tr. 12438; 38143-44; 34832; 34850-41; 13458; 40045-46; 37121; 6259; 34847; 32658; 32095; 38744; 36753; 36808; 40527-28; 37869; 38944; 29037; 35900; 34859; Com. Ex. 3135 E), they insist that the company from which they purchase give them a price at the point of delivery as low as the lowest price quoted by any other seller (Tr. 25492-93; 24605-06; 13458; 41615; 36342-43; 36808; 37121; 38601; 38747; 37692-93; 27697-98; 26444; 34847; 40517; 37121; 37689; 38026; 29036; 38744; 48101-07; 38744; Com. Exs. 971-14Z; Resp. Ex. 1086 A). Each seller, therefore, must adjust his price downward to meet the lowest price known at that destination or forego the business. Buyers often tell the seller about more favorable offers and permit the seller to make a new offer (Tr. 10607-08; 31223; 28398; 7512; 24328-29; 25833; 13639-40; 13596; 39851-52; 13458; 35639; 35643-44; 7557; 30547; 41615; 12442-43; 31307-09; 27108; 39963; 37120; 28004; 28014; 28205; 28416; 28419; 8256; 36481; 36637-40; 38487; 38601; 38748; 37693-94; 34838; 26101-02; 26383-84; 25882; 14283; 47208-09; 30591-93; 46830; 39733; 25443-44; 46986; 47891; 47930; 29407; 30018; 33283; 47586-87; 39851; 34337-38; 38833; 38141-42; 30532; 36343-44; 36125; 36127; 36329; 13297; 39630; 37121; 38022; 36860; 40045-46; 40061-62; 40075; 40527-28; 42014-15; 37690; 38026; 38945; 47660; 38944; 11172-73; 28769; 28773; 35901; 35905-06; 29675; 8713; 11386-87; 12438; 34477-79; 38143-44; 34832; 34840-41; 39851-52; 31308-09; 26379; 35826-27; 26381; 25882; 24352; 24344-45; 41893; 46678; 34647; 38142; 30593-94; 36125; 36343; 41863; 40526; 39333-34; 29035; Com. Exs. 971-14Z; 970-1Q; 3135 E; 3132 D; 971-19V; Resp. Ex. 1996).

6. Cement buyers are constantly alert to prices quoted by all manufacturers in their city or town, as the case may be. They keep in touch with the various sources of

supply and keep well informed on and compare the prices quoted by the cement producers selling in their market (Tr. 39855; 10601-02; 37689; 24605-06; 41615; 36343; 27567; 36807-08; 31202-05; 31227; 40045; 37120-21; 28022; 28398; 8097-98; 38743-44; 35900; 34413; 34428; 32097; 30565; 36138; 36741-42; 40044; 37120-21; 8714; Com. Ex. 3135 D).

7. For a cement manufacturer to forego business in a market by refraining from meeting the lowest price quoted by another manufacturer constitutes a virtual abandonment of that market and a market once abandoned is extremely difficult, if not impossible, to reenter (Tr. 39855-56; 26193; 28194-95; 28144; 23834; 24352; 28742-44; 32647-48; 38140; 41612; 37499-500; 35827; 39492-93; 6652; Com. Exs. 971-3o, I-J). There being no new markets available, cement manufacturers often meet the lowest price in a given market even though it is an unattractive price to them (Tr. 28144; 28637; 11346-47; 11350; 26133; 28676; 24351-52; 24922; 26382; 28738; 5003-04; 27709-10; 28498; 12440-42; 32087; 32288-89; 38140; 41612; 27942-46; 37328; 38945; 47661; 38633; Resp. Ex. 1086 B; Com. Exs. 971-3o, I. J; 971-9L; 970-5i; 975-13D; 976-15J; 970-2Z; 976-10M). The temptation to follow a policy of quoting, always or frequently, successively lower prices than the lowest quoted by others is overcome to some extent by the fact that no seller can increase permanently the amount of his own sales by quoting lower prices because some or all competitors selling in the same sales area inevitably meet his lower quotations, immediately leaving him with no continuing advantage (Tr. 12442-43; 28363-65; 26133; 5088; 47115-16; 47144; 47168; 32289; 34330; 38750-51; 30589; 30847; 23364; 40061; 37121; 37703; 37384-85; 38945; 47661; 28770-72; 38633; 29615-16; Com. Exs. 971-12K; Resp. Ex. 2002 A). Such advantages, however, have been obtained to the extent of forcing many competitors out of large sales areas through the medium of price reductions including those resulting from the establishment of price bases. Accordingly, almost all of the respondents have been forced to abandon and relinquish well-established markets because

they could not afford to meet the lower prices established by their competitors (Tr. 35633; 35695-96; 27434; 33792-93; 23147; 28363-65; 35826; 26076-79; 27211; 28738-39; 27694-95; 47888-89; 27979-80; 47887; 32647; 34609; 38699; 30590; 30506-07; 36119-20; 37127; 39445; Resp. Exs. 2544; 1086 A-B; Com. Exs. 971-9L; 975-8i; S969-1S-T; 975-13A; 976-15G-H; 970-2W; 967-2K; 970-5i; 970-7V) and most, although not all, respondents have at one time or another either openly reduced prices below the lowest price found in a given market or have secretly quoted lower prices than the lowest price found or, in various forms, have given concessions of many kinds equivalent to lower prices (Tr. 13296-97; 19622-24; 6241-42; 25869-70; 13583; 11353-54; 35856; 32761; 6237-39; 6258-59; 40044; 40412; 39640-41; 8161; 38752-53; 34846; 10605-06; 32754; 13045-46; 23720; 11342-43; 47206-07; 47213; 47899; 47203-04; 37374-75; 47895; 47115; 47116; 33238-39; 32763; 32817-19; 32877; 30173; 39853-54; 30321; 32741; 32748; 32759; 32760; 32783; 32790; 47588; 47619; 32758; 34632-33; 34651; 34644-45; 34690; 34641; 34520; 34639; 34356-57; 34488; 34659; 34430; 34657; 34466-67; 34485-86; 38701; 38479-80; 36136-38; 36360; 41782-83; 41786; 41785; 27915; 41944-5; 41851; 28883-84; 36817-18; 42009-10; 40063; 37326; 38024; 37704-06; 28875; 28876; 42297; 36612-13; 42433-34; 42302-04; 42341-42; 42346; 36699; 37510; 37511-13; 35915; 36056; 29591-92; 29593; 13043-44; 46493-94; 39634; 29812; Com. Exs. 970-Q; 314 i; Resp. Exs. 2352 A-C; 3400 A-o).

8. The lowest known price at which cement is offered for sale at a given destination at a given time by any one seller is the "market price" and no purchaser will buy at any higher price. By independent action and as a matter of twenty years usage (Tr. 23177-79; 38756; 36821; 40049; 42009; 46493; Com. Exs. 967-9N), cement manufacturers—some periodically (Tr. 23177-78; 28109; 39853; 38756; 41839-40; 28801), others only when their prices change (Tr. 35640; 39633-34; 39853; 30027-28; 36136; 32102; 32354; 34339; 38143; 30566-67; 37120; 36481; 28801; 37510; 35902), and others irregularly or only occasionally (Tr. 28019; 29531-32; 30566-67; 36821; 42009; 35902)—send printed

quotations of their prices to their customers at each destination where they sell (Tr. 23177-78; 35640; 30559; 27495; 40540; 42191; 39633-34; 28019; 34042-45; 37692-93; 34857; 8132; 8205; 47895; 30027; 39853; 32741; 34338; 38756; 38143; 30566; 36136; 41665; 41839-40; 27714; 36741; 36742; 36831; 40049; 37120; 42008; 37693; 37510; 39633-34; 46493; Resp. Exs. 3716; 1135; 1147-49; 1151-52; 1154-57; 1161; 1168; 1170-73; 1183-84; 1186-90; 1193-97; 1201-02; 1204; 1213-14; 1219-21; 1223; 1225; 1228; 1230; 1232; 1235; 1236-37; 1242-45; 1248; 1251 B-E; 1282-85; 1287; 1117-18; 2438; 2730; 1643-44). (This is commonly referred to as "broadcasting quotations".) The testimony shows that there has been no understanding or agreement regarding this custom, nor with respect to adhering to such published prices and that such price quotations are not sent to competitors (Tr. 26082; 31228; 40539-40; 34042-44; 8643; 34856; 27699; 32354; 32350; 26136-37; 26456; 37119; 36483; 39446; 35900; 23992-93; 37123; 31713-14; 47900; 33869-70; 35904; 34335; 38703; 38747; 30588; 41617; 28810; 36921; 36924; 40049; 37693; 37815; 39634; 39853; 26441; 32772; 28866; 36811; 40044; 46498; 35290; 47758; 36136; 42304). Each respondent keeps currently informed through its salesmen and its customers of the market price of cement at all of the destinations where it sells or solicits business (Tr. 30018-19; 23163-64; 23169; 23059; 23179; 23203-04; 32353-54; 6751; 39851-52; 35639; 35818; 30547; 30550-51; 30552-54; 30811-12; 41614-16; 33376-77; 27375-76; 27495; 36806-07; 36809-10; 31202-05; 31224-27; 31258-59; 31316-17; 40631-32; 40516; 37118-19; 42190-91; 28006; 28007; 28164-65; 28383-84; 33819; 33895-96; 36481; 36636-37; 38145-47; 38742-43; 37688-89; 39446; 38945-46; 484; 4036; 27697; 27884; 36038; 35899-900; 23058; 38749; 34335; 37503-04; 28763; 29590-91; 31713-14; 40261; 28820-21; 30019; 23196-97; 36126-27; 37049-51; 39512; 28009; 28010; 35122-23; 28499; 35982; 32333-35; 35670; 40042-44; 6751; 35087-88; 26079; 27567; 30555-59; 36480; 32100; 31316-17; 40043; 12666-68; 29515; 13456; 14283; 39619-21; 34462-63; 32337; 38821; 47891; 47917; 47122-23; 47146; 47205; 7923; 36343; 30048; 29407; 47587-88; 33266-67; 30070; 30071; 30072; 30038; 32100; 34648; 34638-39; 36125; 27698; 27878; 27881; 27715; 27936-37; 11349-50; 40042; 37809; 36808; 40540; 42064; 42191; 39445; 38960;

28811; 36616; 39446; 31715; 46617; 475; 38742-43; Com. Exs. 971-13L; Resp. Exs. 2336; 2337 A-G; 1645; 1647-68; 458-508; 3120 A-H; 1361-65; 2755; 3021; 1423-A, B through 1431-A, B; 2084 A-N; 2116; 3648 A-H; J-L; 1992; 1997; 2002-08; 2010 A-M; 2012 A-N; 1131-36; 1143-46; 1150; 1153; 1158-61; 1164-67; 1169; 1174; 1176-82; 1191; 1198; 1200; 1203; 1205-08; 1211-12; 1215-18; 1224; 1226; 1227; 1229; 1231; 1238-41; 1246; 1250-52; 1281; 1286; 1289-94; 1296-98; 1993 B-D; 1994 A-G; 2009 A-H; 2000 A-M; 2001 A-M; 2013-22; 2408 A; 1996; 1998 A-B; 3744; 3684 A-E; 3635 A-G; 2085 A, B; 3400 K-o; 2864 A-P; 2212-17; 539-42; 536). The Examiner rejected abundant other documentary evidence to this effect (Resp. Exs. for id.: 1619-27; 1646-47; 2650; 2611-29; 3043-44; 3648 i; 2373; 1976-77; 2330 A-S; 2332 A-B; 2906 A-Z20; 2936 A-B; 2937; 2861; 3140; 3143; 3149).

The last known market price is ordinarily quoted until some one producer quotes a lower price or quotes a higher price which is followed by all other producers. In the former case the lower price automatically becomes a new market price because all producers must meet it or abandon the market. In the latter case the quoting of an advance in the market price has no effect unless the advance is followed by every producer selling in the market. Frequently such advances are not followed; at other times they are followed (Tr. 25044-45; 27495-96; 28020-21; 39852; 47588; 36371-72; 37353; 42007; 37507; 31878; 31886; 31901; 31905; 35985-86; 46500; 23379-80; 24640-41; 32282-83; 6263-64; 42013; 39300-01; 30041; 30050; 30069; 32825-26; 32827; 32828; 32280; 34248; 38701; 40056; 40629-30; 28774; 8903; 37518). When any company changes its prices the others selling in the same area learn of the change through their customers and salesmen immediately or at least within twenty-four hours (Tr. 23058-59; 41614-15; 26080-81; 23165; 31228; 37119; 42191; 28006-07; 28390; 28173; 36480-81; 38145-47; 38742-43; 27699; 30550; 36343; 36809; 38745; 37690-91; 27697-98; 36806-07; 38945-46; 35899-901; 39851-52; 26082; 40042-43; 28812; 23167-68; 23179-80; 36809-10; 27930; 37688-89; 3237; 39619-21; 37695-700; 32772; 29515; 30038-39; 32101; 34335-36; 27715; 11349-50; 30048; 25424;

40062-63; 36817; 35088; 476; 38743; Com. Exs. 3146 C; 3121 E; Resp. Exs. 2002 A-B; 2012 A-N; 2010 A-M; 2003 A-Q; 2004 A, B; D-E; 2007 A-V; 2008 A-Z; 1131-36; 1143-46; 1150; 1153; 1159; 1164-67; 1169; 1174; 1176-78; 1180; 1191; 1198; 1200; 1203; 1205; 1206; 1207; 1211; 1212; 1215; 1216; 1217; 1227; 1289; 1290; 1292; 1296; 1297; 1298; 3744; 1240; 1241; 1252; 1281; 1286). Other evidence showing this was rejected by the Examiner (Resp. Exs. 2330 A-S; 2332 B.

9. Although some respondents have initiated changes in prices more frequently than others, there is abundant evidence showing that there is no particular respondent or group of respondents which has predominated in initiating price changes (Tr. 28005; 12392-93; 26136; 17539-40; 30592; 30018; 29896; 32099; 36896-97; 40060; 37814; 37502-03; 36025-26; 478; Com. Exs. 967-12D; 969-8T; 969-11L; 969-13V; 969-10V; 969-7B; 969-13E; 969-7B; 967-16Y; 967-1P; 967-14T; 975-6V; 975-6V; 975-19A; 970-12R; 975-16U; 976-8W; 976-5F; 969-5i; 969-6L; 975-2R; 967-4X; 967-2F). See also exceptions and citations to Paragraph 164, *infra*.

10. The prices of competitors reported from salesmen and customers to the individual respondent companies ordinarily and as a matter of convenience are analyzed by deducting package charges and the railroad freight from the prices so found (Tr. 949; 30344-45; 17543; 39854; 14283-84; 29514; 41616; 26613-14; 37120; 28007-08; 28374-75; 7513; 36482; 38143; 28764; 17148-49; 487; 35159; 13529-30; 31716-17; 31720; 30027; 32335; 36165; 27704; 13273; 11349-50; 8530-31; 25424; 36810; 40047; 40046; 40515-16; 42191; 28764; 38947; 37614; 35169; 487; Com. Exs. 3121 E; 3127 D; 3129 C; 3146 C), to determine whether or not such prices have any pattern (Tr. 30344-45; 30027; 23058-59; 30551-52; 30811; 40047-48; 28763; 28811; 34337; 30784; 36810; 35903); if so, what the pattern is; whether or not some base point apparently has been used by the company quoting the prices, and, if so, where the base point is located and what base figure has been used (Tr. 30344-45; 25836-37; 32535-36; 39854-55; 13456; 14283-84; 41616; 31258-59; 37120; 42191-92; 28013; 7513; 33806-07; 36482; 37692; 38746; 487; 5126; 26083; 13596; 12666-68; 26082-83;

7541-42; 38143-44; 13529; 5129; 27695-97; 41615-16; 36810; 26614; 28007-08; 17148-49; 31721; 47919-20; 47617-18; 36165; 11349-50; 28764-65; 40047; 42015; 28763; 38947; 38948; 31720; 35903; 35169; Com. Exs. 3121 E; 3160 B; Resp. Exs. 1131; 1132; 1136; 1226; 1227; 1252; 1288; 1296). Where price changes of a company upon analysis reflect a constant figure (or base) at a shipping point for cement or some other pattern, its competitors, immediately, quote new prices arrived at through the use of such constant figure or pattern, for all points where the application of the figure or pattern may result in reductions of existing market prices. Its competitors thus place themselves in a position to stay in such markets by anticipating the lowest price at each market without awaiting direct information concerning the existence of a new price at every point so affected (Tr. 38754-55; 26613-14; 28012-14; 28024-25; 27107-08; 38746-47; 38795; 37692; 39856; 30344-45; 23204-05; 28769; 32335-36; 39854-55; 35643-44; 26101-02; 36343-44; 36165; 27496; 36810-11; 37040; 31311-12; 31203; 40046-47; 30341-43; 47617-18; 34462-63; 36165; 8530-31; 40048; 40516; 37120; 28815; 42191; 52192; 31939; 35904; 487; 39963; 28376; 28423-24; 23806-07; 38143-44; 35288-89; Com. Ex. 3135 E; Resp. Ex. 1136).

11. No respondent has any assurance or foreknowledge, when it attempts to anticipate the lowest prices of competitors, that its prices will be as low (Tr. 23170; 23060; 23206-07; 28769; 32335-36; 39855; 35650; 35661-63; 36811; 40048; 28382-83; 28025; 28373-75; 28424-25; 36482; 38144; 38747; 38794-95; 37692-93; 35288-89; 27705-06; 27940; 39859; 47617-18; 39852-53; 38797; 30840; 30579; 36165; 36359; 41816-17; 27885; 27518; 40048-49; 37122; 37992; 37651; 39799; 484; 9324-25; Resp. Exs. 2010 N-o) and no seller knows the manner in which his competitors determine their prices except in so far as he is able to judge from an analysis of the prices he finds quoted to his customers (Tr. 23060; 23169-70; 40048; 34681-82; 30552; 30784; 28813; 31939; 39656; Resp. Exs. 511; 2002 A; 2373 A for id.). In the rush to meet lower prices in his sales area he makes the most reasonable assumption possible, based on information reported from the field, and relies on subsequent

intensive checking by salesmen and reports from customers to determine whether the assumption was correct (Tr. 35661-63; 33819; 38747; 35288-89; 39619-21; 47920; 47617-18; 39852-53; 30341-43; 30840; 27872-73; 36811; 40048; 37693; 36637-40; 35904; Resp. Exs. 1997 A; 2002; 2010 N-o). The record shows many occasions where respondents subsequently discovered that they had quoted higher or lower than the prices they intended to meet (Tr. 23060; 23170; 23215-16; 23220-21; 32354; 35650; 35661-63; 28045-46; 37503-06; 30353; 39853; 32335-36; 38797; 36165-66; 9324-25; Resp. Exs. 511-18; 2817; 2818; 2819; 2010 N-o).

12. The number of basing points has never been constant but has increased from a few points scattered throughout the country in 1910 to as many as 116 or more points in 1936, representing 75 per cent of the capacity of all cement plants in the United States. Less than 10 per cent of the cement capacity of the country is more than fifty miles from some basing point and the trend over the last thirty years has been toward an increase in the number of basing points (See citation to Exception No. 9, Section I, *supra*).

13. There are no fixed base or non-base mills or any fixed or limited number of base or non-base mills in the cement industry. During the course of the years the status of many plants has changed from a so-called base mill to a non-base mill (Tr. 25839; 41617; 36344-45; 26085-66; 6629-30; 39035; 40050-51; 37122-23; 42377; 28014; 28018; 33819; 36482; 38144; 27704-05; 6623; 33818; 24526-28; 23110-11; 23107-08; 14280; 26673; 40585-88; 40053-54; 37368; 42011-12; 34078-79; 13405; 38293-94; 38126; 38299; 47381; 42135; 28785; Resp. Exs. 457; 455; 2502) and from a non-base mill to a base mill (Tr. 33818; 6623; 24789; 23144; 23133-34; 23107-08; 32511-12; 14277-78; 26505-06; 7116; 27224; 27292; 26682-83; 26673; 32634-36; 33795; 40010; 40585; 40588; 40053; 37368-69; 39630-31; 34078; 38291-92; 38126; 8131-32; 28798; 27704-05; 34674; 35297; 40050; 37122; 42011-12; 42435; 28798; Com. Exs. 976-3C; Resp. Exs. 457; 455).

14. There is no knowledge in advance by respondents as to what mills will or will not reflect a base on a given sale

(Tr. 25829; 29518; 41617; 26086; 31201; 37122; 28018; 33819; 36482; 27704-05; 27861-62; 33186; 32338; 38795; 47893; 37123; 42135; 28764; 28769; 28813; Resp. Ex. 1992 E). The status of each mill, whether it be base or non-base, has been established solely by the respective companies owning the mills without discussion with competitors and without any agreement or understanding with other respondents (Tr. 24573-74; 24887; 3737; 23152-53; 23125; 8708; 29407; 36812; 32636; 13278; 40412-14; 8131-32; 34847-48; 23126; 42333; 42192; 27704-05; 24573-74; 35805; 30591; 29513; 41617; 36899; 27173; 26657; 34663; 39035; 40051; 39631-32; 28357; 33816; 34001-02; 38144; 37815; 37603; 39249; 39269; 27711; 28516-17; 6623; 26086-87; 37122-23; 28015; 8252; 37694; 28789; 47145; 47893; 47314; 4669; 29513; 32632; 34663-64; 34344-45; 32338; 38840; 38748; 38292; 36334; 25464; 36899; 40053; 37310-11; 42011-12; 36483; 28791; 39249; 12623; 42333; 36546; 28790; 36045; 35906-07; 46498; 13035-36; 13095; 13595; Com. Exs. 968-14U; 970-4S; 976-3P; 970-5D; 970-11L; 975-1K; 969-14E; 976-13F; 976-11A; 970-2B; 969-7M; 970-5Z; 975-19K; 970-11X; 970-13Y; 970-14P; 970-15D; 970-8P; 975-17J; 976-4S; 969-4R; 969-5U; 976-10E; 970-6N, 7B; 968-7Z; 975-7Y; 970-7P; 976-15M; 976-14Y; 970-5o; 976-13R; 976-10P; 970-4H; 970-8B). There is no arrangement whereby information re bases or base prices is disseminated among competitors nor are lists of bases or so-called base prices published, or in any sense, distributed to competitors (Tr. 25683; 39822-23; 38948; 28764-65; 28769; 17148-49; 17090; 24598; 25728; 30584-85; 29516; 41617; 27519; 37053-54; 36924; 32825; 37123; 37310; 42292-93; 42192; 36483; 28810; 37815; 38866; 17151-52; 5131; 27862; 28519; 35981; 29513; 32338; 38703; 38219-20; 38145; 23156-57; 26655; 37815-16; 28810; 28800-01; 28809; 46499; 8530).

15. Certain basic factors peculiar to the manufacture and sale of cement make inevitable certain economic effects and results. Briefly, these factors are: lack of customer preference in purchase of standard product; high overhead costs; inelastic demand, plus the fact that demand varies seasonally and locally; and mill capacities in excess of the demand in the areas immediately adjacent

to almost all mills (See exceptions and citations to Paragraph 87, *supra;* 227, No. 2 x, cc. dd, hh, *infra*).

The inevitable economic result of these factors is the attempt to reduce unit costs per barrel by an increase of sales. This requires sales to more distant markets than those which produce the most favorable mill returns (See exceptions to Paragraphs 7-81, *supra;* 227, *infra*).

16. The differences in the mill returns between sales at nearby points and distant points has been referred to as freight absorption but these differences represent nothing more than the partial or complete profit sacrifice involved in meeting the lower prices of competitors who have asserted their geographical advantage (See exceptions to Paragraph 227, *infra*).

17. A downward pressure on price is caused by freight absorbing sales and this is particularly apparent from the evidence on behalf of many respondents, who have operated base mills, regarding the factors which are considered in determining their individual base prices. This pressure is caused by the necessity for having the resulting destination prices lower than the prices of any competitor (otherwise the base is meaningless) and low enough to discourage freight absorbing sales by distant competitors in the company's nearby or principal markets (Tr. 23988; Com. Exs. 967-10 U; Com. Exs. 969-15 D; Tr. 26616; 27222-23; Com. Exs. 976-8U; Tr. 38142-43; Com. Exs. 969-7H; 1N; 969-15U; 976-7H; 7Z; 967-12B; 10T; 13C; 6Z; 970-1N; 975-18Y; 976-5D; Tr. 33795-96; Com. Exs. 969-9i; 968-11U; 967-2T; 968-4R; 5I; 969-2S; 970-16F; 10D; 975-20E; 976-9N; 975-4o; Tr. 40051-55; Tr. 34797-98; Com. Exs. 971-9B; Tr. 6176-77; 6723-25; Com. Exs. 971-3o, N-P; 968-5Y; 6Q; 967-9L). The testimony on behalf of one respondent which has operated most of its mills as base mills was that in recent years the pressure of competitive prices has made it an impossibility for it to attain base figures as high as those which would represent cost plus a reasonable profit and this was confirmed by other respondents (Tr. 23988; 24462-66; 27221; Com. Exs. 971-9Q-R; Tr. 33796).

18. Respondents' mills have been located with reference to the locations of raw materials and markets (See ex-

ceptions to Paragraph 87, Nos. 3, 4 and 5, *supra*). Whether or not the management of a mill operates that mill as a base mill or a non-base mill depends upon its own choice based on the competitive conditions in the area, as for example, the location and size of the nearest markets, the proximity of other mills, the range of existing prices, etc. (Tr. 32079; 32397; 32545-47; 39629-30; 33815-16; 38142-43; 29407; 38294-96; 38058; 27712-14; 47893; 32074-78; 40053-55; 37309-11; 28787; 35906).

Ordinarily where there is a large consuming market near the site of the mill or in the surrounding area, the management establishes a price base for the purpose of reducing prices in that market and making it as unattractive as possible to more distant mills (Tr. 23134; 14277-79; 26673-74; 26678-83; 32636; 40568-70; 40582; 40051-53; 38291-92; 34797-98; 47169; 40055-56; Com. Exs. 971-9 N; 968-7O); and at times non-base mills have changed to base mills, either temporarily or permanently due to an increase in local demand occurring in the area adjacent to the mill, where previously consumption had been small (Tr. 23124-25; 8218-20; 38292; Com. Exs. 968-7 o).

Where a mill has no large consuming area nearby, its management does not as a rule establish a base (Tr. 32394; 32397; 14278; 40053-55; 39731-33; 39629-30; 28015-16; 42011-12; 7523-24; 28787; 28517-18; 47892-93; 32089; 35906; Com. Exs. 971-18A; 970-3C; 976-14Y; 970-5o; 969-1K). Likewise, the proximity of one or more other mills in the immediate area which reflect a base and the absence of appreciable freight advantage over such mills, are factors which make it unattractive and undesirable for some mills to have bases. To have any effect on prices such a base would have to be lower than existing bases and the level of existing prices would not permit any further decrease (Tr. 29407; 40053-55; 39732-33; 39629-30; 34079-80; 28787; 27712-13; 32397; 30591-92; 47892-93; 32075-76; 27708; 34344; 27942-46; 40053-55; 37309-11; 42290; 28790; 35906; Com. Ex. 976-10 E).

"Prevailing Trade Conditions"

Paragraphs 93(a)-(m)

1. Exception is taken generally to that portion of the report included in Paragraph 93(a)-(m), and entitled "Prevailing Trade Conditions" for the following reasons:

It implies by the heading and by subtle generalizations that each of the so-called "conditions" set forth existed simultaneously during the period of the complaint, embraced all sales areas for cement and were common to all respondents, whereas such implications or any of them, are not supported by the evidence or by the citations furnished.

It fails to report fairly, accurately or adequately the evidence explaining the growth and development of each of the various practices and changes in competitive conditions, how they differed among respondents and among sales areas, in what respects uniformity or similarity of practice or conditions did exist and where; and, what is more important, how and why they developed, all of which are abundantly shown in the evidence (For specific exceptions and citations: Regarding "prices" see exceptions to Paragraphs 88-92, *supra;* regarding "Terms and conditions of sale", see exceptions to Paragraphs 148-150, *infra;* regarding "sales to dealers" see exceptions to Paragraphs 139-147, *infra;* regarding "sales to the United States government" and "f.o.b. mill quotations" see exceptions to Paragraphs 130-138; 94-103, *infra,* and 7-81, *supra;* regarding "deliveries to trucks", see exceptions to Paragraphs 120-122, *infra;* regarding "diversions in transit" see exceptions to Paragraphs 123-129, *infra;* see also, exceptions to Paragraphs 7-81, *supra*).

It erroneously asserts that the alleged "conditions" recited developed "from the use of the basing point method" and the application of certain other "principles". There is no evidence to support such assertion and none cited. It fails to report the evidence showing that trade conditions, customs and practices which have existed at various times and places, have developed from the nature of the product, the location of markets, the characteritsics of customers for cement, all of whom are well informed professional buyers,

and other natural competitive influences, and have not in any sense been related to the use of basing points (See immediately preceding citations for specific references).

2. Exception is taken to the failure to report in Paragraph 93(a) that deviations from published prices were a common and continuing condition, indulged in by at least thirty-eight respondents, and not occasional or limited to "special job contracts" as reported (For citations see Exception No. 7, Section II, of exceptions to Paragraphs 88-92, *supra*). In fact the Examiner excluded further proof on the subject (Tr. 32761-62; 32789; 39443-44; 39231; 32820).

3. Exception is taken further to the failure to report in Paragraph 93(a) regarding the cited testimony of Commission's dealer witnesses Callaghan (Tr. 7651), Ryan (Tr. 7760), Duffy (Tr. 7910) and Dain (Tr. 7943; 7953; 8034), that they all were in business only within the metropolitan area of New York (Tr. 7620; 7714; 7912; 7940), and that their testimony was not applicable to respondents other than the few doing business in that area. Exception is further taken to the failure to report the testimony of these witnesses as follows: Their testimony relied on in the report was equally applicable to non-respondent cement producers who were not members of The Cement Institute (Tr. 7973). The witness Ryan testified that the respective manufacturers have met price changes speedily for at least fifteen years (Tr. 7765), and not merely since 1929 as suggested in a question to the witness Dain and reported by the Examiner in the citation to Tr. 8034. Commission's witness Duffy (a dealer) testified that a cement sales organization would be "functioning very poorly" if it did not know of a price change "within half a day" (Tr. 7917); that advance notice of price changes by manufacturers is "essential" to him as a dealer (Tr. 7917-18); and that even on retail sales by cement dealers prices are substantially uniform because one cannot get a higher price than another except in "very, very few places". (Tr. 7931). The testimony of the witnesses Duffy and Dain, cited in the report to support a statement implying simultaneous action by manufacturers regarding prices, does not support it (See Tr. 7926; 7944).

4. Exception is taken to Paragraph 93(b) in its entirety on the grounds that there is no evidence to support it and none cited. See particularly Tr. 37 and 5233-38; which have no application to the subject matter of the sub-paragraph; and Com. Exs. 1936, 2135 and 2124, relating to individual and unrelated acts of three individual respondents. The remaining citations do not even on their face purport to affect all respondents in all particulars reported or each respondent in any particular reported. Exception is taken further to the failure to report in connection with the citation of Com. Ex. 461 the testimony of the writer of the exhibit, explaining the statements therein and the circumstances surrounding its preparation (Tr. 12007-08; 12011; 12022-23; 12039-40; 12042-43).

5. Exception is taken to any suggestion in the expression "uniformly adopted" in Paragraph 93(c), implying understanding, agreement or collusion between any two or more respondents, there being no support for such implication in the evidence and none cited. Exception is further taken to the failure to report the voluminous evidence wherein individual respondents explained their practices regarding the announcement and adoption of policies (See exceptions to Paragraphs 7-81, *supra;* and exceptions regarding specific subjects reported on, *infra*). Exception is further taken to the failure to report that the testimony of the witness Duffy cited at Tr. 7903, *et seq.*, was substantially modified and explained by the witness at Tr. 7926.

6. Exception is taken to the failure to report in Paragraph 93(d) that many respondents sell cement without the point of use being specified and to the failure to report the evidence on behalf of others who ordinarily did not so sell, explaining the competitive conditions underlying their policy (See exceptions to Paragraph 135, *infra*). Exception is taken further to the failure to cite Tr. 6678, which modifies Tr. 6668 (cited) and explains the attitude of the individual company whose policy is referred to; and to the further failure to report that it was conceded at the hearings that all buyers of cement are guided in purchasing, solely by the laid-down cost to them at the point of use; *e. g.*, the Examiner ruled as follows:

> "... The witnesses on both sides have said that they never award on the basis of what it figures back to the mill, but on the basis of what it costs the government to lay it down at the particular point, and there isn't any use of spending a second of time on that" (Tr. 28049).

And Mr. Wooden conceded that "the government, like any other purchaser that wants to use cement at a given place, will actually figure the cost of it from various sources, at the place it wants to use it". There is, he said, "no dispute about it" (Tr. 32672-74; see also, Tr. 36299; 36734-35; 36797-98).

Exception is further taken to the failure to report that the evidence on behalf of the majority of respondents was that requests from public bodies and commercial customers specified the point of use and requested prices delivered to that point. This evidence was so voluminous that the Examiner ruled that he would not

> "waste further time on exhibits ... which are offered to show the customers asked for destination prices" (Tr. 32140).

Citations on the point are collected under Exception No. 3 of Section II to Paragraphs 88-92; see; also Exception No. 1 to Paragraphs 130-138, *infra*). Much additional evidence, oral and documentary, was rejected by the Examiner (Tr. 30526-31; 32140-42; 38857; Resp. Exs. for id., 2074-77; 2295-300; 2302-04; 2954 A-B; 1402-14; 2739-47; 1699-714; 1868-69; 2793 A-L; Tr. 26646-48; 27562; 27566-67, 28946-48; 28949-50; 29797-98; 36885-87; 36888-91; 37164-75).

Exception is further taken to the failure to report that the only evidence regarding requests for prices without specifying the point of use concerns a handful of Procurement Division invitations issued in 1938, and that a number of respondents submitted bids on such invitations (See exceptions to Paragraphs 130-138; *infra;* also exceptions to Paragraphs 7-81, *supra*).

7. Exception is taken to Paragraph 93(e) in its entirety, and to any inference that cost of truck transportation is usually less expensive than railroad freight charges because it is not supported by the evidence or the citations

accompanying it. Exception is further taken to the failure to report that the over-all costs of shipment by truck or water are usually as high or higher than railroad freight charges (Tr. 23686; 30629-30; 32257-58; 38021; 28543; 42642; 42784; 8460; 9089).

8. Exception is taken to the inference in Paragraph 93(f) that "savings" are inherent in diversions of cement in transit, there being no evidence in the record to support it and none cited, and to the failure to report the great body of evidence introduced by respondents explaining their individual policies regarding such diversion and the reason therefor (See exceptions to Paragraphs 123-129, *infra;* and Paragraphs 7-81, *supra*).

9. Exception is taken to Paragraph 93(g) in its entirety because it is an unsupported conclusion and does not report on the evidence. No citations to the evidence are given. Exception is further taken to the failure to define or explain the terms "advantage" and "price" (See also exceptions to Paragraphs 88-92, *supra;* and to Paragraphs 224-227, *infra*).

10. Exception is taken to the implication in Paragraph 93(h) that cement cannot be bought by "ordinary consumers" from anyone except dealers on the ground that the evidence establishes the contrary, *i. e.*, that the United States Government, state governments, railroads, concrete products manufacturers and ready-mix plants, as well as many contractors purchase cement direct from manufacturers (See exceptions to Paragraphs 7-81, *supra* and 139-140, *infra*).

11. Exception is taken to the inference in Paragraph 93(j) that the statements therein regarding price reductions and increases are applicable to all respondents and to the failure adequately to report the following evidence explaining the gradual development of and competitive reasons for the practices mentioned and the extent to which they are used by the individual respondents.

The NRA Code of Fair Competition contained provisions requiring declines in price to be retroactive on all shipments made five days before the date of the decline

and requiring a price to be on file for five days before it could be quoted (Com. Exs. 557; 560). Theretofore, there had been no uniformity of practice among cement manufacturers in either respect (See citations below). During the Code these provisions were compulsory and accordingly adhered to. Since the NRA Code there has been no uniformity of practice among all respondents in either respect, although many if not most (the evidence is silent as to many) respondents give the benefit of a price decline retroactively on shipments made within five days, and initiate advances in prices on five days' notice to customers.

Five days' notice of an advance in price had been initiated by the Dewey Company in 1915 with an announcement and full explanation to its customers (Resp. Ex. 3628, pp. 8-9). Dewey made the most of this new angle of protection to its trade to acquire dealer good will and increased business (Resp. Ex. 3632, p. 7; Tr. 47037-39; 47421-22; 47045-46).

The practice adapted by Dewey did not spread to all other parts of the country, however. The only evidence regarding Pacific Coast respondents indicates that no definite practice prevailed there except during the NRA Code period (Tr. 42904; 8965-66). The evidence regarding the eastern part of the country shows a slow adoption of either advance notice to customers or willingness to accept orders at the old price after notice of immediate advance was given, but no definite period such as five days existed among all companies (Tr. 23352-53; 24519-20; 24521; 26776; 26122; 27857-58; 35279; 36899-900; 7650-51; 8261; 8269).

Dealer witnesses testified that advance notice of increase or at least opportunity to purchase at the price before the increase, is an advantage to the dealer (Tr. 7651; 7917-18). Where one competitor extends this advantage to the customer, others must meet it or lose business and good will (Tr. 24521; 26776; 7651; 8149). The state owned plant of South Dakota has given such advance notice (Tr. 41513).

There is abundant evidence that this practice was not the result of agreement or understanding among respond-

ents (For citations see exceptions to Paragraphs 148-150, *infra*; and 7-81, *supra*).

The evidence shows that some respondents have made their declines in prices retroactive on all shipments made within five days of the decline, since the end of NRA (Tr. 26778; 31261-63; 35279-80; 36188-90; 40231; 47036-37). The state-owned plant at South Dakota has a similar practice (Tr. 41514-15). Other respondents have no set practice in this respect (Tr. 42906; 37514; 27247; 6110; 6318; 6320). The evidence is silent as to most respondents.

The idea of giving customers the benefit of declines on shipments in transit was originated by one company in 1915 or 1916 as a matter of fairness to its customers (Tr. 47421-24; 47046-48; see also Resp. Ex. 3632, p. 7 quoted, *supra*). Other competitors had to meet this condition or lose their business, and they did so, handling each case that arose on its merits (Tr. 24522; 26778; 31261-62; 36186-87; 36188-90; 47052-53).

The Trial Examiner refused to receive evidence showing the development of the practice (Tr. 36141-45; Resp. Exs. 2652-55 for id.; Tr. 32352).

There is abundant evidence showing that the practice to the extent it exists was not the result of agreement or understanding among respondents (For citations see exceptions to Paragraphs 148-150, *infra*; 7-81, *supra*).

Exception is further taken to the failure to report that after a price increase becomes effective a cement company is unable to make any sales at the increased prices for at least a month and that it is several months before a company realizes the increased prices on all of its sales (Tr. 23357-58; 26123; 26776; 27716-19; 26779; 31262-66; 32112-13; 33933-35; 35902; 35914; 36146-50; 37514-15; 37703-04; 38751-52; 39856; 40062; 47061; Resp. Exs. 2403; 3545; 3546; 3548; 3554; 3556-57; 3560). Further evidence to this effect was rejected by the Trial Examiner (Tr. 38228-30).

12. Exception is taken to the failure to report in Paragraph 93(k) that use of specific job contracts is a long established custom in the cement industry and that they were discussed and approved by the United States Supreme Court in the case of *Cement Manufacturers Pro-*

tective Association, 268 U. S. 588 (1925) (See exceptions to Paragraphs 202 and 203, *infra*).

13. Exception is taken to so much of Paragraph 93(l) as infers that so-called freight absorption to the extent it occurs in cement sales is an unnatural device or result produced by any particular method of pricing, there being no support for such inference in the evidence and none cited. Exception is taken to the failure to report the evidence that freight absorption is a natural, competitive phenomenon for cement sales, common to many heavy goods industries, and that the expression "freight absorption" means "price reduction required by competition" (See exceptions to Paragraphs 88-92, Section II, Nos. 15-17, *supra*).

14. Exception is further taken to any inference in Paragraph 93(l) that cement prices are unreasonable or "too high" because there is no evidence to support it. Moreover, the Examiner ruled that "The fairness of price is not in issue in this case" (Tr. 36427; 40126-27) and respondents were repeatedly precluded from producing evidence to show that cement prices were not too high or unreasonable by accepted standards (Tr. 33886; 32326; 33606-09; 36759; 33831; 33392; 29556; 29611; 35321; 35327; Resp. Exs. for id. 2527-2529; 32959).

15. Exception is taken to Paragraph 93(m) in its entirety because it is not supported by the accompanying citations.

"Identical Bidding"

Paragraphs 94-103

1. Exception is taken generally to Paragraphs 94-103 in the following respects:

The statement in Paragraph 94 that the tolerance order of the President was intended "to secure bids at varying prices" is not supported by the evidence (See Com. Ex. 179).

The statement in Paragraph 94 that the "principle of a 15 per cent variation was rejected" is inaccurate and mis-

leading and not supported by the evidence. An orderly and prescribed protest to the tolerance order was filed with the deputy administrator in charge of the Cement Code. This protest was signed by 92 per cent of the members of the Code (Tr. 3358). No joint or concerted action, other than the signing of this protest, was taken by respondents regarding the tolerance order (Tr. 28598-99; 32780; 36516; 39163; 41713; 46940). No instructions or suggestions were issued by the Cement Code Authority to the members regarding the tolerance order (Com. Ex. 277 E) and the Code Authority observed the order strictly in the operation of its affairs and recognized the order as a defense to complaints for selling below filed prices in violation of the Code (Tr. 17053; 17089).

The statement that the tolerance order was objected to because it "would permit the bidding of all sorts of prices on government jobs" is an adoption of the language of Commission's Counsel and not supported by the evidence. The fundamental purpose of the so-called open price plan was to give each member of the industry "full knowledge of competitive prices" (Tr. 3359; Com. Ex. 277 E).

Requests to withdraw or correct bids had no relation to whether or not competitors' prices reflected bases and the implication in Paragraph 94 that they did is incorrect and not supported by the evidence. There is no support in the evidence for the expression "group figure" used in Paragraph 94 nor for the implication of concerted or collusive action attending the expression. Moreover only two instances of withdrawal, one of which was during the NRA Code period, and two attempts to correct bids were shown in the evidence (Tr. 6394; Com. Exs. 154 C; 1057; Resp. Exs. 2028-29).

The implication in Paragraph 94 that any bidder could foretell what figure or figures would be bid by competitors so that a bidder could know in advance that his bid would be "higher" or "lower" than any so-called "group figure" is contrary to the evidence (Tr. 6420; and see exceptions to Paragraphs 88-92, *supra*).

The statements in Paragraphs 95 through 103 are incomplete and misleading in the following respects:

The lettings referred to in Paragraphs 95 and 103 occurred during the period when the NRA Cement Code was in effect and the invitations to bid required compliance with the Code (Com. Exs. 167 A-B; 178 D); in each case pursuant to the Code the prices bid had been filed with the Code Authority by one of the bidders, and transmitted by the Code Authority to the other potential bidders (Com. Exs. 164 I-J; Tr. 24258-61; Resp. Exs. 810; 811; 813-15; 1717-21) and likewise in each case the prices filed and bid were substantially lower than the then commercial market prices at the site of the projects (Com. Exs. 166; 874 N; 874 L; 178 C; Tr. 37912).

The invitations for the lettings referred to in Paragraphs 98, 99, 100, 101, 102 and 103 requested prices f.o.b. destination (Com. Exs. 372 B; 373 B; Resp. Exs. 812; 3182 C; 3675; 3678-87; Com. Exs. 180 D-H); the invitations for the lettings referred to in Paragraphs 96 and 97 specified that awards would be made on the basis of the lowest cost at destination (Com. Exs. 168 C; 175 E); and as to the only invitations specifying prices f.o.b. mill with no alternative (referred to in Paragraphs 95, 96 and 97), f.o.b. mill prices were filed and bid on one of them (Com. Exs. 164 I; 164 G; 164 U-W; 466; Resp. Exs. 18; 19), and in the other two instances, the Government was enabled to determine its own f.o.b. mill price (Com. Ex. 168 A; Tr. 1566).

Among the bids received in the lettings referred to in Paragraphs 97, 98, 99, 100 and 103 were bids at the same figure by non-respondents, *i. e.* United States Portland Cement Company (Paragraph 97), Allentown Portland Cement Company (Paragraph 98), Louisville Cement Company (Paragraph 99), Standard Lime and Stone Company (Paragraph 100) and Washington Building Lime Company (Capitol) (Paragraph 103).

As to each of the lettings referred to in Paragraphs 95 through 103 the testimony of witnesses and contemporary documentary records in the form of exhibits show that the prices of the respective bidders were arrived at independently without understanding, agreement or collusion (Resp. Exs. 783; 859; 897; 1316 A; 1742; 1743; 2284 A; 2335 B-C; 2885 A, F-G; 3046 B; 3164 A; Tr. 2403-A35; 24042-43; 27866-67; 28044-45; 29023; 29024; 29409-10;

31895; 39666-67). Some of the contemporary documents further establishing independent action were rejected by the Examiner (Resp. Exs. for id. 2335 A; 2335 E; 1861; 1863; 1866; 3047).

2. Exception is further taken to the failure to report in Paragraph 95 that the Invitation to Bid furnished the bidders with a schedule of the land grant rates applying from 25 shipping points to destination and these land grant rates were used by the bidders (Com. Exs. 167 A; 164 X; Tr. 1635); and that Alpha did not bid because the filed price was lower than the price which had been bid on a previous letting and lower than it felt it could afford to quote (Tr. 24050-51).

3. Exception is taken further to Paragraph 96 in so far as it fails to report the following:

This letting occurred during the period immediately succeeding the invalidation of NRA Codes when open price filing voluntarily continued for a short period through the Cement Institute; the price bid was filed by one respondent and disseminated to other potential bidders (Resp. Ex. 3396 A; Com. Exs. 590 A-B; Tr. 35926-27).

The land grant rates used were those furnished by the government on the prior letting of June 5, 1934 (Com. Exs. 167 A; 168 A).

The bid price was 20 cents per barrel lower than that bid on June 5, 1934 (Com. Exs. 166; 168 A), so low in fact that several respondents could not afford to bid (Tr. 24051; 41762; 42259; 47022).

The bid of Three Forks was rejected because it contained conditions regarding maximum shipments (Com. Exs. 168 F; 168 N).

The bids of Universal Atlas and Three Forks contained an exception to the specifications relating to subsequent legislation on wages and hours (Com. Ex. 168 N).

4. Exception is further taken to the failure to report in Paragraph 98 that the Government was quoted the same price which the bidders had been quoting their commercial customers at the destination involved (Resp. Exs. 783; 1316 A; 3164 A; Tr. 28044).

5. Exception is further taken to the failure in Paragraph 99 to report as follows: The evidence cited therein is not an official tabulation (Tr. 2390-91) and is incorrect (Com. Ex. 373 B; Resp. Exs. 1739; 1867; 2885 H); the action of the officials of the Bureau of Prisons forced at least one bidder to make its terms uniform with the other bidders (Tr. 32175-76; Resp. Exs. 2335 B-C) and further evidence to this effect was excluded (Resp. Exs. 1864 for id.; 1865 for id.; Tr. 29785); and that the price quoted was the same price as the bidders were quoting their commercial customers at the destination in question (Resp. Exs. 1742; 1743; Tr. 29409-10; 27866-67; 29022-23).

6. Exception is further taken to the failure to report in Paragraph 100 that the price bid by respondents was the commercial price at destination (Tr. 24034-35; 24042-43; 28044-45); and that it was not the sum of any base plus existing freight (Com. Exs. 1110 K; 1111 C; Resp. Ex. 3700).

7. Exception is further taken to the tabulation in Paragraph 101 regarding the destination Perry, Oklahoma, in that Oklahoma and Monarch did not bid and the opening date was not March 8, 1936 but March 18, 1936 (Com. Ex. 2497); the opening date for Stillwell was not August 22, 1936 but August 17, 1936 (Com. Ex. 2507; Resp. Ex. 3678); and several of the tabulations are incorrect and incomplete in substantial respects (See Com. Exs. 2497; 2501; 2506; 2507; Resp. Ex. 3681; Tr. 20011).

8. Exception is further taken to the failure in Paragraph 102 to report as follows: Respondents independently obtained the applicable land grant rates from the Louisville & Nashville R. R.; they bid the commercial price at destination (Resp. Exs. 897; 2284 A; 3046 B; Tr. 25336-37; 31894-95 39665-67); on a prior bid one respondent had dropped all fractions of a cent, and thereby was low bidder (Resp. Ex. 896; Tr. 25329-30; 25333-34); anticipating a like procedure, other respondents began to adopt this practice on future bids in order to be competitive and the bid in question was one of such subsequent bids (Resp. Exs. 897; 2284 A; 3046 B); the invitation specified that

"award will be made on basis of lowest cost at destination figured on prices f.o.b. mill plus government freight. Bidders may equalize freight rates with land grant rates available to government destination" (Com. Ex. 180 I); the prices bid were not, in fact, identical and some bids were rejected because of special terms (Com. Exs. 180 A-C; 180 D).

9. Exception is taken to Paragraph 103 in that it fails to report the following: All bids at $1.84 on the January 18, 1935 opening of the bids for Tygart Dam (Com. Ex. 178 A) were rejected and readvertised for opening on February 1, 1935 (Tr. 1576; 20349-51; 24259; 28991; Resp. Ex. 812 A). This price had been filed with the Code Authority by Alpha and it was disseminated in due course by the Code Authority to 30 respondent and 3 non-respondent companies (Tr. 24259; Resp. Exs. 810; 811 A). In reaching this figure of $1.84 Alpha applied the pattern which earlier had been laid down by the T.V.A., *i. e.*, taking $1.40 at the second nearest mill freightwise (Tr. 24258-59). The result was a price 20 cents below the commercial price at Grafton, West Virginia, of $2.04 (Com. Ex. 178 C; Tr. 37912). There were 16 respondent and one non-respondent bidders on this opening (Com. Ex. 178 A). When bids were readvertised Alpha determined upon and filed with the Code Authority a new and lower price of $1.77 bulk delivered at Grafton (Tr. 24259-60; Resp. Ex. 813). This price was disseminated by the Code Authority in the usual course to 31 respondents and 3 non-respondents (Resp. Ex. 1718). There were 13 respondent and 1 non-respondent bidders on this letting and again all bids were rejected by the Government (Tr. 20349-50; 24260; 37912; Resp. Ex. 193). Bids were readvertised for the third time for opening on February 16, 1935, and Alpha, after discussions with the District Engineers and other officials of the War Department, decided to quote a price figured on $1.40 at its Mannheim mill plus freight or $1.70 (Tr. 20352; 24260-61). This price was filed by Alpha with the Code Authority and it was disseminated in due course to 31 respondents and 3 non-respondents (Resp. Exs. 814; 815; 1717; Tr. 24261). There were 10 respondent and 1 non-respondent

bidders on this letting (Com. Exs. 178 B-C). Alpha received an award of 600,000 barrels and two other bidders, Medusa and Bessemer, received an award of 300,000 barrels each (Tr. 24261; Com. Ex. 178 C). The award was at a price which was 34 cents below the commercial price at Grafton, West Virginia (Com. Ex. 178 C; Tr. 37912).

"Involuntary Basing Mills"

Paragraphs 104-113

1. Exception is taken to the failure to report in Paragraphs 104-13 that each instance referred to occurred in a "price war" period and represented the effort of one respondent, acting independently and in its own self interest to meet prices (largely unpublished prices) quoted by one or more competitors in a sales area where it was striving for business (Tr. 26893-94; 26896-97; 24587; 23289; 24506-07).

2. Exception is taken to any implication in Paragraph 104 that the so-called "imposed bases" were the equivalent of "price" in any legal sense (See exceptions to Paragraph 224, *infra*).

3. Exception is taken to the repetition of the unsupported assertion that a cut price was regarded as violating "the ethics of the basing point system" (See exceptions to Paragraph 92, *supra*).

4. Exception is taken to the attitude expressed in Paragraph 104 that a competitor may not meet competition except by the "consent" and in accordance with the "wishes" of his competitor. This is contrary to the evidence. (See Exception No. 2 to Paragraph 164, *infra*).

5. Exception is taken to the failure to report in Paragraph 105 that Lone Star's use of a base at the Spocari Company's mill was prompted not by the Spocari Company reflecting a freight advantage in its prices, but by its quoting of lower prices which Lone Star had to meet (Tr. 6691-

92). Those lower prices reflected the use of a base (Tr. 6684-85).

6. Exception is taken to the implication in Paragraph 105 that Lone Star purchased the Spocari mill because of its secret prices, on the ground that the evidence does not support it. The actual reasons for the purchase are stated in the record (Tr. 34672-74).

7. Exception is taken to Paragraph 106 in its entirety on the ground that the Examiner has intermingled and confused several separate episodes regarding Michigan prices and ignored the evidence showing that as much as three years intervened between some of the events which, as reported, appear to have occurred simultaneously or in close sequence. Exception is accordingly taken to the failure to report as follows: Huron established a silo at Saginaw, Michigan in March 1933 and established a base at that point of $1.35 by quotations issued March 6, 1933, effective March 10, 1933 (Tr. 33397-99; Com. Ex. 3332). Saginaw is about 11 miles from Bay City where Aetna had a mill and the freight rates from each city to almost all Michigan points are identical (Tr. 33399; 30044-45). Thus, Huron's prices based at its Saginaw mill, in turn appeared to reflect the same base at Bay City. The Indiana Highway bids of 1933 were opened March 23, 1933—two weeks subsequent to the establishment of the Saginaw base (Com. Ex. 1857).

Prices which had been based on Saginaw were reduced 10 cents per barrel as a result of quotations sent out by Wabash in the middle of April 1933 (Tr. 33402) and these prices were discovered independently by competitors from quotations in the field (Com. Exs. 1122 D-E).

Because of increasing costs caused by the wage and hour changes pursuant to N.I.R.A., Peerless increased the Wyandotte base in July 1933 and a similar increase was then inaugurated by Huron at its Alpena and Saginaw bases. Aetna further advanced Saginaw from $1.50 to $1.65 on July 24, 1933. Huron and Peerless followed on July 29, 1933. Other competitors followed these increases (Resp. Exs. 2407; 2506; Tr. 33404-05; Com. Ex. 3334).

In September 1933 Wabash reduced Michigan prices which had been based on Huron's mill at Saginaw (Tr. 33405). Thereafter from 1933 through 1935 Michigan prices rose and fell several times, reflecting changes in the existing bases as well as the establishment of a new base (Tr. 33405; 33407; Com. Exs. 1185; 2645; 2366; Tr. 33409-10; 33408-09; 33304).

About June of 1936 (not in 1933 as reported in Paragraph 106) Cree of Aetna induced a customer of Wabash to breach his contract with Wabash and then sold to the customer the quantity of cement which was to have been furnished by Wabash under its contract. Wabash at that time reduced the Saginaw-Bay City base (Tr. 33409; 33668; Com. Exs. 418 B; 3341).

There were no effective increases in the Saginaw, Bay City, or other Michigan bases thereafter, as reported (Paragraph 106) but on the contrary Michigan prices were unstable. Attempted price increases by individual respondents since that time have continually failed (Tr. 30068-69; Resp. Ex. 1997 D; Tr. 30089-90; 33668; Resp. Exs. 1995 A-D; 1994 E; 2010 A; Tr. 30041; 30043-44; 30049-50; 30061; 34246). Michigan prices have been lowered several times since and have been consistently lower than prices in surrounding areas (Tr. 30046; Resp. Exs. 1996-2003; Tr. 30056-57; 33699; Resp. Exs. 2005; 2006; 2010 A-B; 2011 A).

The "flat price" for Michigan referred to in Paragraph 106 was inaugurated in January 1937 by the Huron Company and it prevailed until April 1938 under the following circumstances:

When Aetna's attempted increase of December 1936 was not followed, Huron was not able to discover either the level of competitive prices or what prices it had to meet. Accordingly, Huron sent out a flat price for the lower peninsula of Michigan (*i.e.*, the same delivered price for every destination), which was lower than had prevailed before the attempted increase by Aetna. This was met by competitors who learned of it from their salesmen and customers (Tr. 33668-70; 33410-11; 30038; Resp. Exs. 1995 E; 1996; 1997; 1998; 1999 A-F; Tr. 40049-50; 34337-38; 34518; 35910-11; 11274-76).

It is conceded that in 1936 Aetna and Wabash were involved in a "private" price war covering their common sales territory, but this had no relation to the Saginaw or Bay City bases which had been established three years earlier.

8. Exception is taken further to the assertion in Paragraph 106 that there was a "general understanding" regarding the Wyandotte base (See Tr. 951; also 23128-29).

9. Exception is taken to the assertion in Paragraph 106 that the establishment of the Saginaw-Bay City base was a retaliatory measure. Even the witness Cree testified it was not (Tr. 827; see also 978-79; 986).

10. Exception is taken to the failure to report that the "criticisms" mentioned in Paragraph 106 were made in connection with violations of the NRA Code by Aetna (Com. Exs. 1016; 1007; 986 B; 1020-H; 1008 B, C, D; Resp. Exs. 2028 to 2030; 2636 D; 2425-26; 2428). Com. Ex. 20 cited by the Examiner was dated October 3, 1933, over six months after the March 1933 Indiana bids were opened; and while approval by the government of the NRA Code was pending (See Exception No. 5 to Paragraph 4, *supra*).

11. Exception is taken to the failure to report in Paragraph 107 that in quoting prices reflecting bases at Louisville and Ada in 1931, Lehigh was merely openly meeting prices already quoted by competitors with mills at those points (Tr. 27279-81; 27275-76; 12993-94).

The following record references in no way relate to the matters reported in Paragraph 107: Tr. 2241; 2248; 2250; 2257.

12. Com. Ex. 2827 cited in Paragraph 108 was withdrawn by government counsel and is not part of the record (Tr. 37140).

13. Exception is taken to the failure to report in Paragraph 109 that the base figure used by Lehigh at Speed, Indiana, and Kosmosdale, Ky., was the figure it traced back to those mills from their respective delivered prices (Tr. 13217; 27288; Com. Exs. 971-23N-O; 971-14U).

14. Exception is taken to the failure to report that Marquette's prices in January 1931 generally, or in most cases, reflected $1.35 at Cape Girardeau and that Alpha in using that figure in determining its prices was attempting to make its prices as low as Marquette's (Tr. 23286-87; 23289; 24587-88; 14013-15; 40010-11; 25870-75).

15. Exception is taken to the failure to report in Paragraph 110 that when the state-owned South Dakota plant began to operate in 1924 it was selling at prices which were lower than its published prices and also was obtaining a monopoly of South Dakota business because contractors were compelled to use the state product exclusively and in turn dealers were therefore forced to buy it (Com. Exs. 971-23Q-R; Tr. 26905; 12747). As a matter of fact the sales manager of the state-owned South Dakota plant testified for the Commission as follows (Tr. 12747):

> "Q. Is the cement of other mills used also on South Dakota state work? A. It is available.
>
> Q. Is it, as a matter of fact, used? A. Not if I can help it, no, sir.
>
> Q. Can you always help it? A. I have so far."

To protect itself and to attempt to meet this competitive condition Lehigh began to quote prices in that area based on the same figure at Rapid City as Lehigh used at its Mason City plant (Tr. 26906). This did not change the price at Rapid City (Tr. 12765).

16. Exception is taken to the statement that the "price of the state-owned plant" was lowered "from 60 cents to 70 cents per barrel" because the manager of that plant testifying for the Commission denied it (Tr. 14279-50). Exception is furtlier taken for the failure to report that there never was a time when the base at Rapid City was below that of other bases in the area (Tr. 12753).

17. Exception is taken to the failure to report that Lehigh's use of bases at mills of competitors was in each instance the result of publicly meeting delivered prices quoted by such competitors (Tr. 27279-82; 27276; 27278-79).

18. Exception is taken to the phrase "disciplinary measure" in Paragraph 111, as a conclusion, and to the

failure to report that the quotation from Diamond's Burns & Clark questionnaire answer (Com. Exs. 970-5D) referred to the entry of the Alpha Company into the Ohio area by the acquisition of a mill at Ironton, Ohio.

19. Exception is taken to the distortion of the facts caused by the selection out of its context of a portion of McCourtie's letter in Paragraph 111. Exception is further taken to the failure to report the following: McCourtie was acknowledging a request by Young, Chairman of the Public Relations Committee of the Portland Cement Association, regarding capacities of Trinity's plants for use by the Committee. McCourtie stated he could not furnish the information "in view of the fact that conditions indicate that a dissolution of the association is now imminent".

Following the excerpt cited in Paragraph 111 of the Report the letter closes, as follows:

> "if—as—and when—the executives within the industry again pull themselves together, act sanely and do business as business ought to be done, there will be no difficulty in obtaining our cooperation all along the line and in every proper way" (Com. Exs. 1195 A-B).

20. Exception is taken to the failure to report in Paragraph 112 that Com. Ex. 817 G; characterized in the Report as "a recommended plan for price enforcement" was written in contemplation of a revised NRA and opened as follows:

> "Regardless of whether there is an acceptable revision of NRA or not I have lost any expectation that we shall get a system of open prices under Government auspices that will be adequate in fact finding and enforcement. I believe an open price and a one-price system is the only one fair to customers and that it is essential to the well-being of our industry."

Exception is further taken to the failure to report that Young closed his letter to Rader (Com. Exs. 817 I-J) immediately succeeding the excerpts quoted in Paragraph 112 as follows:

> "However, there is a far cry between the method employed by certain individual companies in the

> past and the method advocated in the plan. For example, Lehigh at any time may elect to meet lower prices by a general price reduction. So long as we follow our practice of obtaining the evidence of reduced prices ourselves and so long as we retain exclusive right to be the sole judge of price infractions, no legal objection can be raised * * *. My own impression is that any such joint action (as recommended in the plan) would be construed as a conspiracy to fix prices in restraint of trade and would, therefore, be in violation of the anti-trust laws."

Exception is further taken to the failure to report that Young recommended that the proponent of the plan referred to should submit an outline of it to his attorneys for a specific opinion (Com. Ex. 817 J).

21. Exception is taken to Paragraph 113 in its entirety on the ground it is a conclusion and opinion and for the failure to designate it as such. Exception is further taken to the designation "system" as applied to the so-called involuntary imposition of a base and to the assertion that it is different from the bona fide meeting of competitors' prices on the ground that it is not supported by the evidence. Exception is further taken to the failure to report that it was the testimony of respondents' economists, that, as to the alleged imposition of a base at a competitor's mill, no economic conclusion or opinion could be expressed without "knowing the circumstances" (none of which have been reported as shown, *supra,* in exceptions to Paragraphs 104-112 of the Report). Exception is further taken for the failure to report the following economic evidence on the subject:

> "Q. Do you think that putting in such a base under the circumstances outlined would have any relationship at all to the preservation or maintenance of the pattern which the non-base mills had been departing from when they cut prices? A. Well, in the non-base mill, I say I do not pretend to know all the details of these cases that you are talking about, but if the non-base mill does cut price then it seems to me that it is itself making itself a base mill.

Q. Even though it did not intend to become such? A. Well, the question of being a base mill, as I understand it, is not a question of anybody's intention to become a base mill as such. It arises from the fact that a mill does not quote a price which is lower than the price made at some other mill plus freight to some particular point. If it does that it becomes by that fact a base mill" (Tr. 43462).

"Trial Examiner Norwood: Now, suppose, then, that all other prices were immediately quoted so that he could not cease to become a base thereafter, would that suggest to you a competitive setting?

The Witness: If he is quoting a price which is lower than the price that would be fixed by a distant base mill plus freight, then, as your Honor said, he does become a base mill.

Trial Examiner Norwood: But suppose that he cannot get away from that thereafter, his competitor persists in continuing on that base, would that be a competitive situation?

The Witness: Yes, I would say it is a competitive situation" (Tr. 43463).

"Institute Rate Books"

Paragraph 114

1. Exception is taken generally to the unsupported implication arising from the captions, "Means Employed"—"Institute Rate Books", preceding Paragraph 114, that the Institute rate books are a means to any common or concerted purpose among respondents or any of them except the purpose of obtaining accurate freight rate information in convenient and usable form at low cost (For citations see exceptions to Paragraphs 114-119).

2. Exception is taken to the conclusion that bids identical to the fifth decimal place "could not be arrived at except through careful calculations from identical factors" and to the failure to report any of the evidence showing the manner in which various respondents independently determined their prices on sealed bids; and to the failure to report that no calculations were involved in the cases

where prices were filed during NRA and for several months thereafter; no calculations were involved where, as often happened, bidders independently quoted the lowest price last quoted at the point in question; and no calculations were involved when bidders quoted their own destination price or destination cost, taken from their individual company records (For citations, see exceptions to Paragraphs 95-103; 88-93; 131-138).

3. Exception is taken to any implication that prices of respondents on sealed bids have been collusively arrived at or that the computation or use of land grant factors has ever been the result of agreement of collusion (See citations referred to above).

4. Exception is taken to the phrase "upset the price structure" in Paragraph 114 and to any implication that a fixed or collusive price structure exists in the cement industry. Such implication is not supported by the references cited nor by other evidence. Exception is further taken to the assertion that a lower price will secure "an order"; and to the failure to report that a lower price is always immediately met by competitors (See Exception No. 7 to Paragraphs 88-92, Section II and exceptions to Paragraphs 7-81, *supra*).

5. Exception is taken to all of the citations in the first paragraph of Paragraph 114 on the ground that none of them support the statements for which they are cited.

6. Exception is taken to the failure to report that the evidence shows the following with respect to the subject matter of the second paragraph of Paragraph 114:

In the conversion of freight rates into per barrel terms, it has since time immemorial been the universal custom of all cement companies, non-respondents as well as respondents, to drop fractions of less than ½ cent and add those of ½ cent or over. This has been done through custom and convenience and is not the result of agreement or collusion (Tr. 16880-82; 23272; 27000-01; 37753; 38212; 38477-78; 38710; 39450; 40786; 42234-36; 46510-13; 46710; 46719; 48101-07; Com. Ex. 2609; Tr. 4041-42; 5243-44; 6195; 23269-71; 27000-01; 29409; 33095-96; 34676; 37332-33;

37357-58; 37746-47; 37753; 38211-12; 38710; 40786-87; 41484-85; 42131-32; 42234-36; 46510-13; 46708-10).

Railroads follow an identical practice in billing freight per carload (Resp. Exs. 3600-01; Tr. 34674-75; 34722-23; 38477-78; 38212-13; 38574-77; 46716-18).

A difference of $1.25 per car resulting from the conversion of rates per cwt. into cents per barrel would be rare and the evidence shows that actual differences are infinitesimal (Tr. 6195; 33096-98; 33533-35; 34721-26; 40786-92; 41400-01).

Any price determined by including fractions of a cent, if lower than a competitor's price would be met or beaten; if higher it would be meaningless (See Exception No. 5 to Paragraphs 88-92, Section II, *supra*).

7. Exception is taken to the remainder of Paragraph 114 on the ground that it is not supported by the citations given nor by the evidence and for the further reasons and grounds stated in exceptions to Paragraphs. 130 through 138, *infra*.

8. Exception is taken to the unsupported statement that changes in rates "often introduced disturbing factors" and to the failure to report the following:

The Interstate Commerce Act requires railroads to give not less than 30 days' notice of a rate change except with special permission of the I.C.C. and most rate changes authorized by the I.C.C. have been made after 30 days' notice to all parties interested (Resp. Exs. 2891 A-L; Tr. 9405; 36601; 36986; 40757-58; 40766-67; 46684-85).

Many cement prices bear no relation to freight. Whether a freight rate change will bring about a change in prices which have a freight component depends on whether or not some company independently announces new prices reflecting the change, and competing companies choose to meet the new prices. New lower prices reflecting freight rate reductions must immediately be met. Increases in such prices have not always been followed (Tr. 24804-05; 27482; 27751; 28396-97; 28431-33; 28526; 29165-66; 29336-40; 30764; 31773-74; 31925; 34678; 36166-67; 36990; 37526; 39601-02; 39619-25).

Paragraph 115

1. Exception is taken to the absence of any report describing or showing the nature of the Institute freight rate service and to the following unsupported and piecemeal statements and implications contained in Paragraph 115:

The statement that The Cement Institute Freight Rate Bureau "grew out of", "succeeded to the activities of" or was connected with prior rate services; the implication that any of the rate services referred to, including that of the Institute, were used by all respondents, or were national in scope with respect to territory covered; the implication that there has been no time interval between the periods of operation of the freight rate services referred to; the implication that the Institute freight rate books contained freight rates from basing points only; the implication that the Institute at all times provided rate books for all states except those named. None of the foregoing is supported by the evidence (See citations below).

Tr. 4465-71; 7004; 35126; 38558 and Com. Exs. 749-2V cited in Paragraph 115 have no bearing on the matters for which they are cited.

The Institute's answer to the complaint does not in any way support the statement that the freight rate books contain rates "from basing points".

2. Exception is taken to the failure to report the evidence showing the following regarding the matters referred to in Paragraph 115:

The prior rate services referred to in Paragraph 115 functioned at different and non-continuous periods of time in different and limited localities under separate managements; they were not used by the same cement producers, most of those which used them are no longer in existence or are not respondents and only a few respondents ever used those services; they all operated prior to the organization of the Institute, and had no connection with it. The National Traffic Bureau continued in existence for approximately six months after the formation of The Cement Institute. (Tr. 4027-29; 14407; 14477-79; 16842-44; 16875; 17125-26; 23260-68; 24611-12; 24613; 26170-72; 26996-97; 27479-82; 28026-29; 28528; 31272-73; 33098; 35802-03;

35806-07; 36154-55; 38157; 38159; 38558-59; 38595; 38708; 42197; 47384; Resp. Exs. 1092-93; 1354; 3788, p. 108; Com. Ex. 2849). The freight rate books of The Cement Institute are substantially the same in form and substance as those of the Cement Manufacturers Protective Association which were approved by the United States Supreme Court in *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588, 597 (Resp. Ex. 3788, p. 108; Tr. 26996-97; 27000-01; 31078-80; 35802-03; 38184).

When the Institute was organized no rate service was provided for because such service was then available at relatively small expense through the National Traffic Bureau. When the service of that bureau became inaccurate, unsatisfactory and generally deficient, the Institute, in March 1930 after soliciting its membership, established its own rate service at low cost for subscribers whether members of the Institute or not (Com. Exs. 136 B, W, SS, LLL; Resp. Exs. 1374-77; Tr. 4057-58; 12767; 12783; 13221; 16843-50; 16874; 17125-26; 23266-68; 24611-12; 27483; 30949-53; 31273; 34567; 35922; 36154-55; 38157-60; 38595; 38597-98; 41479-81).

Compilations of accurate freight rate information in convenient and quickly usable form have always been essential in the conduct of the cement business and many respondents and other companies have always used either a rate compilation of their own or a compilation prepared by some independent rate agency when such service was available (Com. Ex. 2609; Resp. Exs. 2339; 2375-76; 2380; 2656-57; 2718 A-D; 2798-99; 2858 A-F; 2968 A-E; 3199; 3363; 3420; 3578; Tr. 13221-22; 13286-87; 13710-11; 13900-01; 14049-50; 14291-93; 23234-35; 26168-72; 26995-97; 27479-83; 27555-56; 28026-29; 28397-98; 28689-90; 31272-73; 32358; 33093-95; 33098-102; 33104-07; 33300-01; 34430; 34438-39; 34674-77; 35802-03; 35891-93; 36152-57; 36568-70; 36982; 37313-15; 37742; 37966-67; 38157-59; 38190-91; 38708; 38950-52; 39447-50; 39588-90; 39829-31; 39892-93; 40709-16; 41479-81; 41821-22; 42048-49; 42196-97; 46513-20; 46682; 46694; 46701-02; Resp. Exs. 2256 A-B; 3207 A-G; Tr. 5135-36; 8235-36; 13287; 16846-50; 23266-67; 23273-76; 24611-12; 24,804-05; 26614; 26169; 26173-74; 26998; 27001; 27473-74; 27477-79; 27482-83; 27641; 27751;

28029; 28033-34; 28396-97; 28399-400; 28431-33; 28526; 28692-93; 29163; 37060; 30764; 31848-65; 31976-78; 31773-74; 31981; 33298; 33300-01; 34435; 34675-80; 35804; 35921; 36029-30; 36168-69; 36409-11; 36677-78; 36821-22; 37038; 37313; 37525-26; 37638-39; 38184; 38188-89; 38210; 38708-09; 39591; 39861; 39893; 40744; 41383; 42196-97; 42384; 46509-13). Purchase of rate compilations from some central source has been preferred by most producers to compilation of their own books because the former have afforded savings both in actual money cost as well as in time and labor consumed (Resp. Exs. 1374-77; 2059; 2256 A-B; 2340 A-B; 2458 A-B; 3207 A-G; Tr. 5135-36; 8222; 23273-76; 26169; 26173-74; 27473-74; 27477-79; 27482-83; 27751-52; 27887-88; 28026-32; 28039-40; 28399-400; 28442; 28684-87; 28692-93; 29163; 30356; 30764; 31273; 31327; 31762; 31774-75; 31855-65; 31976-78; 31981; 32224; 32361-64; 32367-68; 33119; 33123-34; 33165-68; 34677-78; 35124-25; 35845-51; 35921; 36029-30; 36409-11; 36821-22; 37525-26; 37638-39; 38188-91; 38210; 38660; 38707-09; 39588-90; 39829-31; 40744; 42196-97).

Several respondents have always compiled and used their own freight rate information and have never subscribed for or used the rate service of any outside agency, Institute or other (Com. Ex. 2609; Resp Exs. 2380; 2718 A-D; 2798-99; 2858 A-F; 2968 A-E; 3363; 3403 A-C; 3420; 3578; 3596 A-B; Tr. 8669; 12669-71; 13286-87; 13710-11; 13900-01; 14034-37; 14291-93; 14439-40; 16853; 30242-45; 33299-300; 34430; 34433-35; 36568-70; 36677-79; 37313-15; 37742; 37966-67; 37968-70; 38950-52; 41479-81; 41821-23; 41917-19; 42048-49; 42458-59; 42460-61; 42471-72; 42879-80; 42895; 42898; 46513-20; 46694; 46701-02; 47263-65; 47657; 47667; 48116; Resp. Exs. 2340 A-B; Tr. 4033-36; 16847-50; 16874; 32224; 32358; 32361-68; 35124-25).

At first the Institute had three bureaus—Bethlehem, Pa., Chicago, Ill., and Kansas City, Mo. (Tr. 16844-46; Com. Exs. 988 G-H). Since 1930, the Institute has operated only two rate bureaus at Bethlehem, Pa., and Chicago, Ill. (Com. Exs. 136-3L; 626 A-B; Resp. Exs. 125 A-B; 126 A, B-C; 127 B-C; 143 A; 728; 3596 A; Tr. 4008-09; 14407-08; 16715; 16729-30; 16853; 30869-71; 31075-80).

In addition to the states for which no rate books were ever published (as reported in Paragraph 115) no Institute rate books were published for Texas until late 1934 and for New Mexico until October, 1935 (Com. Exs. 136 YY; 1110 T; Resp. Ex. 126 C; Tr. 3154-55; 16846; 16852-53).

The Institute rate books show the lowest current all rail freight rates per cwt. on cement, compiled and kept up to date from official railroad tariffs on file with the I. C. C. or state regulatory bodies. They list the actual lowest all rail freight rates to all actual carload freight stations in the state or area covered by the book from all points of actual shipment located within the state or area, as well as from all outside points from which any appreciable amount of cement is shipped to such stations, or from which rates are requested by shippers (Resp. Exs. 91; 2643 A-C; Com. Ex. 1110 W; Tr. 4008-09; 4091; 4109-10; 4113-14; 16854-55; 16861-64; 28023; 31969-71; 33135; 38168-69; 38566; 38709; 40744; 40751-52; 40757; 42197-98). It has never been any concern of the Institute whether or not shipping points shown in its books are basing points and it has not been the practice of the Institute to limit its service to rates from basing points only (Resp. Exs. 91; 143 A; 158 A-V; 159 A-B; 2643 A-C; Tr. 4008-09; 4091; 4113-14; 16845; 16854-55; 16858-64; 16913; 38161; 38168-69; 38562; 42197-98; 46519).

Paragraph 116

1. Exception is taken to Paragraph 116 in its entirety as misleading, inaccurate and not a fair report on the evidence and particularly to the statements in Paragraph 116 implying that the purpose of the Institute rate books is to insure the use of identical freight factors, and that the absence of certain information prevents their use for other purposes.

2. Exception is taken to the failure to report regarding the purpose and use of the Institute rate books, the evidence showing that:

Respondents and other companies that have subscribed to The Cement Institute freight rate service have done so because it gives them in convenient, most accurate, quickly available and easily usable form, at small expense or at cost considerably less than the cost of compiling and maintaining similar books individually, the day to day rate information they must have in the operation of their business (Resp. Exs. 2059; 2256 A-B; 2458 A-B; 3207 A-G; Tr. 5135-36; 5229; 5241; 8222; 11169-70; 16847-50; 16874; 17127-32; 23273-76; 24612; 26164; 26169; 26173-74; 26998; 27001; 27474; 27482-83; 27639-41; 27751-52; 27887-88; 28026-35; 28396-97; 28526; 28684-87; 29163; 30356; 30760; 30764; 31273; 31327; 31762; 31774-75; 31848-65; 31931-32; 32224; 32361-68; 33119-20; 33123-34; 33165-68; 34675-78; 35125-25; 34806-07; 35845-51; 35921; 36028-30; 36168-69; 36821-22; 36982-83; 37038; 37525-26; 37638-39; 38184-85 38184; 38188-91; 38210; 38660; 38708-09; 38757; 39588-91; 39829-31; 39861; 40101; 40721-23; 40744-46; 41383; 42196-97; 42384; 46686-90).

3. Exception is taken to the failure to report the following evidence regarding each of the items of alleged omissions from the rate books:

Regarding routing information. A cement shipper does not need routing information for shipping purposes, so long as he knows the lowest freight rate applying from his mill to the destination of the shipment. The Institute rate books in all cases supply the lowest applicable rate in convenient and speedily available form. When a bill of lading is delivered to the carrier with the lowest applicable rate shown the carrier must ship via any route it has open that will produce that rate. Many respondents use the Institute rate books in this way for shipping purposes and have found them wholly adequate (Tr. 4026; 5228-29; 5245; 6225-26; 6326-32; 27888-89; 27891; 27898; 28033-34; 29037-39; 28434-35; 28437-38; 28687; 29360-61; 30356; 30761; 31745-46; 31755-57; 31767-68; 31926; 32773; 36159-62; 36433-34; 36822; 37523-24; 37606; 37613-14; 38192-94; 38197; 38709-10; 38758; 38813; 39832; 39893-94; 40750; 40756; 40797; 41394-96; 41843; 46692-93; 4026; 4030-31; 6326-30; 28437-40; 28690-91; 29519; 29859-64; 39920-21; 40797; 41570; 41825).

If there is more than one carrier serving the mill and a shipment is tendered to a carrier which does not have a route over which the rate is applicable, that carrier must and does so notify the shipper. The shipper then either changes the rate or gives the shipment to a carrier that can protect the rate. If a carrier cannot protect the lowest available rate but nevertheless handles the shipment, the shipper is protected by law on the rate specified in his bill of lading (Tr. 28437-40; 31757-59; 31926-27; 31999-2001; 33134-38; 36391-407; 38476-77; 38710; 40728-30; 40750-51; 46693; 46730; 48467-68). Moreover where alternative routes are available between a cement shipping point and any destination, rates are generally the same over all available routes (Resp. Exs. 3203 A-D; Tr. 33127; 36390; 36393-95; 40728-30; 40736-38; 40742-43; 41408-12; 47255-58).

Most cement shippers are familiar with available routes, anyway, and in a given case where a route is desired, and the shipper does not know the route it is a simple matter to check it in a railroad routing guide or on a railroad map (Tr. 28037-39; 28434; 28437-40; 29856-59; 31927-29; 33134-35; 35921; 36157-62; 36390-407; 38197-98; 38709-10; 40730; 41483-84; 41825; 42335; 46730; Resp. Exs. 3202 A-E; 3203 A-D; 3204; 3205; Tr. 40727-35; 41824-25). Moreover, a route can be checked through the tariff more speedily and readily, when a shipper has the lowest available rate from the Institute book.

Regarding minimum car weights. The Institute rate books indicate on their face that rates shown are applicable on carload shipments. The inclusion of minimum carload exceptions in the rate books would be superfluous and even companies which publish and use their own rate books do not include such information. Every shipper knows by memory the minimum carload regulations in his area and even a new shipping clerk becomes familiar with them in a very short time (Tr. 31756-57; 31929-30; 47189-91; 40753; 9632-36; 47178-88; Com. Exs. 1110 A-D). For example the minimum carload weight for the entire territory east of the Mississippi River has been 50,000 pounds since January 1924 and rates on cement in this territory differ with the size of the car only when the shipment is below the minimum weight; and most respondents seldom if ever make

railroad shipments of less than the minimum weight (Tr. 27889-90; 28435-36; 29360-62; 31756-57; 31929-30; 36168; 40753-55; 41115-19; 47186). In the occasional territories west of the Mississippi River where lower rates apply on car weights over 50,000 pounds, The Cement Institute freight rate books so indicate (Com. Exs. 1110 H, T, BB; 3016-2i-2R, 2V, 2Y; 3028; 3037; 3247; Tr. 38906-07).

Regarding switching charges and differences in rates to different parts of a city. When there is more than one delivery station in a particular city and a customer is taking delivery on the team track of a delivering line that did not receive the road haul, there is, as a rule, an addition to the road haul rate in the form of a switching charge; however, on shipments of freight taking delivery on a line other than the originating line, this charge is always absorbed by the railroad out of the line haul. Switching charges, if any, at a customer's private siding are universally absorbed by the last carrier receiving the line haul. No charges other than the rate shown in the rate book are involved (Resp. Exs. 3210-15; Tr. 31763-64; 31766-69; 31951; 40768-86).

Regarding the absence of references to railroads. Such information would be superfluous. Its only purpose would be in connection with routing and routing information as already shown is normally unnecessary (See citations regarding routing, *supra*).

Regarding invoicing and showing both the initial carrier and route on invoices. The evidence shows that respondents use the Institute books for invoicing and have found them adequate for the purpose (Tr. 4026; 4031; 5229; 5244; 5247; 6224-32; 27638-39; 27888-89; 27891; 27898; 28434-40; 28687; 29360-63; 30356; 30761; 31745-46; 31755; 31762; 31926; 32773; 36822; 37523-24; 37606; 37613-14; 38192-94; 38709-10; 38758; 38813; 39832; 39893-94; 39920-21; 40756; 41394-96).

4. Exception is taken to the reference to Com. Exs. 2707-71, 72, *et seq.*; 2796-1, *et seq.* and Resp. Exs. 2291-3-30, 52, 65 since they do not support the statements for which they are cited.

5. Exception is taken to the reliance on testimony of Commission's witness J. P. Simpson (Tr. 9365; 9549) in Paragraph 116 on the ground that the witness had never attempted to use such books for shipping purposes and had never seen one before his appearance as a witness (Tr. 19295).

Paragraph 117

1. Exception is taken to the further unsupported implication in Paragraph 117 that the Institute rate books are used exclusively for price calculations and to the further failure to report the following regarding the use of rate books and the use of freight rates by cement sellers:

Many of the prices quoted by respondent and other companies bear no relation to freight rates (Tr. 4487; 6532-34; 6763; 8939; 8959; 9082-83; 23989-90; 26084; 26672-73; 26822-23; 27107-08; 27135-38; 27728-29; 27870-71; 28174; 28379; 28530; 30579-80; 31223; 31230-32; 31933-34; 32514-16; 33488-89; 34833-34; 35285-86; 35644; 35820-21; 35903; 36051-52; 36338-42; 36345; 36644-45; 36812; 37381-82; 37428; 38144-45; 38487-88; 38634-35; 38745-47; 38793-94; 38819-20; 40048; 40253; 40557-58; 40589-90; 42015-16).

Many respondents never have used Institute rate books (See citations and Exception No. 2 to Paragraph 115, *supra*).

Freight rates are used in numerous ways by cement sellers: to enable a company contemplating a price change to determine the extent to which the territory in which it markets its cement will be affected by the change; to determine whether price changes reflect any pattern; and if so, as an aid in anticipating what new prices may be quoted at points where actual quotations have not been picked up; to determine whether or not the company's mill net on new prices or on a particular piece of business will be attractive enough to warrant quotation (Resp. Exs. 1131-33; 1136; 1159; 1198; 1211; 1226; 1227; 1252; 1288; 1296; 1415 F; 2373 A; Tr. 4027; 5044-45; 5229; 6194-95; 7513-15; 5134; 8022; 8153; 8529-31; 11349-50; 13221-22; 13596; 14283-84; 23051-52; 23058-60; 23170; 23176-77; 23204-07; 23234-44; 23847-48; 25424; 25836-39; 26082-84;

26101-02; 26613-15; 26671-73; 27107-08; 27496; 27518; 27695-97; 27703-06; 27861-64; 27884-85; 27939-40; 28006-08; 28012-14; 28024-25; 28045-46; 28176; 28373-76; 28394-96; 28423-25; 28763-65; 28769; 28811; 28813-14; 29408-09; 29513-16; 29518-19; 30344-48; 30550-54; 30579-80; 30811-12; 30828; 30840-41; 31202-03; 31223; 31307-09; 31716-17; 31719-21; 31744-45; 32335-36; 32356; 33806-07; 33819; 33895-96; 34335-37; 34678-79; 34831-32; 35159; 35174-75; 35643-50; 35661-63; 35808-11; 35902-04; 36138-39; 36155; 36164-66; 36342-44; 36359; 36480-82; 36809-12; 36821-22; 37119-23; 37427; 37604; 37613-14; 37651; 37654-55; 37691-94; 38138-39; 38143-45; 38743; 38745-48; 38758; 38794-97; 39619-21; 39743-45; 39747; 39852-56; 39963; 40046-49; 40056; 40514-16; 41479-81; 41615-17; 42191-92; 42196-97; 46501; 42386-87; 42391-92; 47617-18; 47917-20; 47937-38; 47940; 13286-87; 26164; 28033-35; 28526; 29867-68; 29878-80; 30778; 31329-30; 31716-21; 33173-76; 33179-80; 34727; 35851-52; 36049-53; 37036-37; 38182-83; 38186-92; 47937-38; 47940).

2. Exception is taken to the implication in Paragraph 117 that all salesmen of all respondent companies carry Institute freight rate books and to the failure to report the following:

Many respondents do not receive or use Institute rate books (see *supra*). The practice of respondent companies who receive and/or use Institute books with regard to supplying books to their salesmen is not uniform (Tr. 6777; 7126-27; 7514-15; 8076; 13899; 26998-99; 28035-37; 28382; 29408; 29688-89; 31324-26; 32772-73; 35124; 35920-21; 36050; 37040; 37527-28; 37622-26; 38757; 40065; 47588; 47757).

3. Exception is taken to the implication in Paragraph 117 that salesmen frequently used Institute freight rate books to quote delivered prices on the ground that it is not supported by the evidence. Further exception is taken to the failure to report that company salesmen to whom Institute or other rate books are supplied are thoroughly familiar with prices in the territory they solicit and have little if any occasion to refer to rate books in quoting prices (Tr. 14447-51; 14456-63; 23236-40; 26999; 28035-37; 28527; 31324-26; 32772-73; 36570-71; 37040; 38749).

4. Exception is taken to the implication in Paragraph 117 that the freight rate books issued by the Institute do not contain accurate freight rate information and to the failure to report the following:

The Institute rate books are kept currently up to date by the Institute freight rate bureaus. All changes or modifications in official freight rates are brought to the attention of subscribers to the service as they occur through the medium of supplements. As the rate books themselves become increasingly supplemented through this medium, they are revised and reissued (Com. Exs. 1110 A-DD; 3009-40; 3043; 3247; Tr. 9546-49; 16860; 16869-70; 18939-45; 20866-68; 24616-17; 29869; 31775-76; 31784-90; 38184-86; 38215; 40802-04; 42197-98; 48010-11; 48020-21; 48036; Resp. Exs. 2244; 3222 A-E; 3223; 3594 A-D; 3694 A, B, X-Y; 3709-10; 3758-59; 3761-63). See also Exception 8, Paragraph 114, *supra*.

The Institute rate books are accurate as the result of constant checking by the Institute rate bureaus and by users of the books who call any inaccuracies, real or fancied, to the attention of the appropriate rate bureau for correction (Resp. Exs. 162 A-B; 164 A-B; 2239; 2242 A-B; 2245 A-E; Tr. 16870-74; 23272-76; 24616-17; 24631-33; 26999-7001; 31747-54; 31790-91; 36387; 38184-85; 38213-14). Of the millions of rates shown in the Institute rate books only a few instances of errors have occurred and of these few instances there was no evidence that the erroneous rates were used; and the destinations involved were places where there was no demand for cement and to which no shipments had been made (Tr. 13743; 13901; 14440-41; 16870; 16874; 19295-300—offer of proof; 28396; 28432-33; 31790-92; 32368; 32439; 33172-73; 36026-29; 36387; 36582-96; 36598; 37356-57; 37525; 37614-15; 38213-14; 38469-75; 40759-60; 41120-23; 42293; 48041; 48043).

5. Exception is taken to the implication in Paragraph 117 that respondents use Institute freight rate information they know to be incorrect since there is no evidence to support it. Further exception is taken to the failure to report the evidence on behalf of numerous respondents that where they learned of an error in a rate in an Institute

book they disregarded that rate and used the correct tariff rate (Resp. Exs. 2240-41; Tr. 4027-28; 11351-52; 13222-23; 13712-13; 13901; 14440-41; 16870; 24631-32; 25682-83; 25821-22; 25829-31; 26999-7000; 28432-33; 29164-65; 29360-61; 29519; 29869-70; 30351-52; 30760-61; 31747-50; 31754; 31916-21; 32006; 32773; 33172-73; 33305-07; 34678-80; 35803-04; 36163-64; 36166; 36387; 36408-09; 36569-70; 36986; 37034-36; 37315-16; 37331-32; 37525; 37614-16; 38215; 38952; 39590-91; 39860-61; 40757-61; 42293; 42393-94; 46700-01).

6. Exception is taken to the statement in Paragraph 117 that it was regarded as important that the conversion tables in these books should conform, there being no evidence to support it and none cited. Further exception is taken to the failure to report the following:

Since 1933 none of the rate books published by the Cement Institute Chicago rate bureau have contained conversion tables and since December 1935, none of the books published by the Bethlehem rate bureau have contained such tables (Resp. Ex. 157; Com. Exs. 628 C; 1110 B, E-i, L-N, P, T, V, W, BB-DD; 3247). There is nothing unusual about a conversion table, however since it is merely a tabulation of rates converted from cents per hundred-weight into cents per barrel, and many companies, long prior to the issuance of Institute freight rate books, used conversion tables as a bank would use an interest table, *i. e.* for convenience (Com. Ex. 2609; Resp. Exs. 2339; 2375 A; 2376 B; 2718 A-D; 2969; 3363 B; 3428; 3597 A-B; 3598 A-B; 3599; Tr. 5244; 6195-96; 23269-71; 27000-01; 29409; 33095-98; 34674-75; 34676; 34722; 37332-33; 37357-58; 37746-47; 37753; 38211-13; 38477-78; 38710; 39450; 40786-87; 41484-85; 41824; 42234-36; 46510-13; 46708-11; 46718-19; 48101-07).

7. Exception is taken to any implication in Paragraph 117 that respondents and other companies do not use Institute rate books for shipping purposes on the grounds and for the reasons stated in exceptions to Paragraph 116, *supra*.

Paragraph 118

1. Exception is taken to the unqualified statement in Paragraph 118 that Institute rate books are used for calculating prices and that respondents use rates from the Institute books regardless of correctness, on all the grounds and for the reasons stated in exceptions to Paragraph 117, *supra*.

2. Exception is taken to the implication in Paragraph 118 that Com. Exs. 287 A-D correctly expresses the policy and practice of Lone Star or of any other respondent regarding the use of Institute rate books. Exception is further taken to the failure to report the following evidence concerning the matter referred to in this exhibit:

Com. Exs. 287 A-D refers to the use by Lone Star's Virginia sales manager of a rate which was not in effect but was merely a promise by an official of the railroad involved that the rate might be applied in the future. The Virginia sales manager, therefore, used not the actual rate but a non-existent rate (Tr. 6199-200; 6203; 6205-08; 6212; 6214-15; 6227; 6274).

The Lone Star Company's policy is to use freight rate information contained in Cement Institute books for pricing and shipping purposes only if that information is correct (Tr. 6201). Under this policy, Lone Star considers it to the company's interest to insure the accuracy of information appearing in those books by reporting any inaccuracy to the rate bureau so that correction may be made (Tr. 6202-04). Lone Star, however, uses the correct information for all purposes (Tr. 6200-01; 6203-04; 6215-16).

Com. Exs. 287 A-D did not relate to a Virginia Highway bid by Lone Star, as reported, and so shows on its face.

Paragraph 119

1. Exception is taken to the implication in Paragraph 119 that respondents contended that they use Institute rate books for shipping purposes only, or that they use freight rates shown in Institute books between destinations and producing points other than their own, there being no

support for such implication in the record (See also exceptions to Paragraphs 116 and 117 and citations thereto).

2. Exception is taken to the failure to report in Paragraph 119 that Institute rate books save producers considerable expense in securing accurate freight rate information (For citations see Paragraph 116, *supra*).

3. Exception is taken to any implication in Paragraph 119 that the Institute's Alabama rate book or any other of its rate books show freight rates only from basing points on the ground that it is not supported by the evidence. Further exception is taken to the Trial Examiner's failure to report as indicated in Paragraph 115, *supra*.

4. Exception is taken to any implication that Institute freight rate books are necessary to enable respondent companies to meet competitive prices and to the failure to report as already shown that many respondents do not use Institute rate books and never have; and that respondents and other companies have always been able to meet competitive prices regardless of whether or not they used Institute rate books or any other rate books (See citations in support of exceptions to Paragraphs 116 and 117).

5. Exception is taken to the failure to report the evidence showing that there is no agreement among respondent companies regarding the use of Cement Institute freight rate books (Tr. 5231-32; 5241; 6202; 6204; 8439; 8444-45; 13222-23; 14034-36; 16854-55; 16870; 23276-77; 24616; 24631-33; 28404-05; 26169-70; 26173; 26996-7001; 27482; 27751; 27885; 27939-40; 28396-97; 28526; 28528; 29164-65; 29409; 29869-70; 30351-52; 30760-61; 30764; 31076-80; 31274; 31327-28; 31330-31; 31924; 32014; 32772-73; 33095-98; 33105; 33172-73; 33305-07; 34430; 34676-80; 35804; 36026-29; 36163-64; 36166; 36569-70; 36665-68; 36701-02; 36982; 36986; 37314-16; 37331-33; 37357-58; 37526; 37606; 37709; 37753; 37755-56; 38161; 38168-69; 38211-12; 38215; 38478; 38709-10; 38952; 39450; 39590-91; 39860-61; 40758-61; 40786-87; 40796-97; 41484-85; 41821-24; 41826; 41835-36; 41917; 42048-50; 42196-98; 42234-35; 42293; 42471; 42879-80; 42898; 46510; 46513-14; 46519; 46700-03; 46708-10; 46719; 47657; 47677; 47913; 48101-07; 48116; 48119).

"Trucking"

Paragraphs 120-122

1. Exception is taken generally to the failure in Paragraphs 120 thru 122, to report that the evidence is overwhelmingly to the following effect:

Except in a few sections of the country, where delivery to trucks has always been freely made, the great majority of cement customers are opposed to the delivery by respondents to buyers' trucks; relatively few customers have requested such deliveries; and they have constituted only a small percentage of total shipments. The citations which follow are merely representative (Tr. 35154; 35139-40; 32286-88; 31465-67; 31470; 37862; 29881; Com. Exs. 969-8Y; 970-2G; 975-17T; 976-13Y; Tr. 6342-44; 32851-53; 32857; 33346-48; 23660-62; 26181-82; 28137-38; 27795; 42045; 29131-32; 38019-20; 36175-76; 36383; 26847-50; 39582; 38150; 41537-38; 40069-70; 35261-62; 41626-27; 35689; Resp. Exs. 2558-61 for id.; Tr. 39843-45; 36954-55; 42198-99; 7268-70; 4138-39; Com. Exs. 969-12S; Tr. 35919; 37130; 33844; 23644-46; Resp. Ex. 703; Tr. 35673-74; 35689; Resp. Ex. 2554; Tr. 35836-37; 33849-50; 38019; 26183; Resp. Ex. 1094; Tr. 27356-58; Resp. Ex. 1356; Tr. 7274; 26862; 6252; 28093-94; 28100; 28540-42; Resp. Ex. 1630; Tr. 32283; 30635; Resp. Exs. 25556 A-B; Tr. 26880; 33847; 27810; 27922; 39840; 31461; Resp. Exs. 2112; 2193; 2662-68; Tr. 39537; 38460-63; Resp. Ex. 2356; Tr. 29126; 30643; 29519-20; 36642; 36486; 46646; 46631-32; 42642; 42477; 8943-44; 8738; 8442; Resp. Exs. 2974-76; Tr. 35150; 41534).

With few exceptions (See exceptions to Paragraphs 7-81, *supra*) cement plants in all parts of the United States have inadequate facilities for loading trucks, with the result that it is inconvenient and more expensive to load trucks. The citations which follow are merely representative (Tr. 6121; 32858-64; 6789-90; 8460; 8760; 31462-72; 28094-96; 30642-43; 28542; Resp. Ex. 2557 for id.; Tr. 38727-28; 39537; 32284-86; 39843; Resp. Ex. 3061; Tr. 41627; 41964-65; 38910-13; Resp. Exs. 2970; 2971-73 for id.; Tr. 30128; 36955; 37856; 38149-50; 42198-99; 42475-77; 46646-47; 29897; 37549; 8440; 23654; 27354-56; 41535-36;

40071; 7273; 35919-20; 36010; 33848-50; 38019; 30132-33; 33345-46; 27794-95; 29133-34; 36071; 35683-88; 32264; 42375).

Every manufacturer who has initiated any policy or practice to limit or eliminate deliveries to customers' trucks has taken such action primarily because of the foregoing, and neighboring mills have taken similar action in order to meet the competition of such policies or practices. The citations which follow are merely representative:

Regarding the establishment by some companies of an extra charge for delivery to trucks: Tr. 7276; 23689-90; 26851-53; 26893; 28134-36; 35674-75; 35677; 38150-51; 40071; 33848; Resp. Exs. 712; 710 for id.; Tr. 42375-76; 42045-46; 38913-15; 41535-36.

Regarding discontinuance of deliveries to customers' trucks by some companies: Tr. 40036-38; 35185-93; 35677; 23714-16; 28136-37; 26853-63; Resp. Ex. 708; Tr. 23702-05; 33845; 38151; 23693-95; Resp. Ex. 706; 2555-56; Tr. 31343-44; 35153-54; 39582; 39706; 32852-53; 37130-31; 26885-86; 36954; 26891-92; 42042-44.

2. Exception is taken to Paragraph 120 in its entirety because many of the citations to the record accompanying it do not support any part of the statements for which they are cited, and the remaining citations standing alone or in conjunction with other portions of the record not cited support them only in part. The following obviously have no application to the subject: Tr. 6701, *et seq.*, 7697; 912; Com. Exs. 969-5J, K, 10o.

3. Exception is taken to the statement beginning "the cement industry generally found" because it erroneously implies that all respondents had a common attitude toward truck delivery. Such implication is contrary to the evidence (See exceptions to Paragraphs 7-81, *supra*).

4. Exception is taken to the failure to report that the only "price disruption" involved in delivery to trucks affected dealers' retail prices (Com. Exs. 975-18o, 19D; 1043-4S; 2773; Resp. Exs. 706; 2556; 2662-68; Tr. 7268-69; 8033; 23660-62; 26181; 31469; 33346-47; 34689; 35693-94;

36175-78; 33849-50; 36383; 36954-55; 38150; 39582; 39843-44; 40069-70; 41537-38; 41626-27; 42045; 42114).

5. Exception is taken to the statement that "delivered prices as shown were based on rail freights" because it is an inaccurate and incomplete report on the evidence (See exceptions to Paragraphs 88-92, *supra*).

6. Exception is taken to the inference that truck transportation was usually cheaper than rail transportation. This is contrary to the evidence (Resp. Exs. 2390 A-F; 3295 A-H; 3299-302; 3311-12; 3315; Tr. 8451; 8460; 8760; 9089; 12476-79; 12481-82; 12497; 23686; 28544-45; 30129-32; 30143-44; 30629-30; 30634; 32254-59; 33646; 35149; 38152-54; 41029-58; 41163; 41167; 42642; 42784). Further evidence to like effect was rejected by the Examiner (Tr. 30439; 38152-54).

7. Exception is taken to the unsupported statement "producers would have to vary their mill nets in making allowance for the differences in truck costs" because it is not supported by the evidence or by the accompanying citations (See citations to Exception No. 1, *supra*).

8. Exception is taken to any implication that the experience of the Lehigh Company as quoted in the report was representative of the experience of other respondents since it is not supported by the evidence (Tr. 4135; 28452-53; 36178; 34748-49).

9. Exception is taken to the failure throughout Paragraph 120 to specify to which if any respondents the words "The cement industry", "Mills" and "producers" were intended to refer and the further failure to report the differences in practices of individual respondents as shown by the evidence (See exceptions to Paragraphs 7-81, *supra*).

10. Exception is taken to the failure in Paragraph 121 to report that all respondents did not use a 15 cent or other additional charge for loading trucks and to the failure to report the evidence showing which respondents never imposed any such charge (Tr. 11366; 23705; 26864; 31467-68; 32856-58; 33140-42; 34272; 35156; 35185; 35919-20;

36176; 36486; 36957; 37549; 38151; 39581-82; 39844; 41628). Exception is further taken to the failure to report the voluminous evidence explaining the reasons for the extra charge where used by some respondents. (See citations to Exception No. 1, *supra*). Exception is further taken to the failure to report that among the individual respondents which charged for loading trucks, some charged more and some less than 15 cents (Com. Exs. 967T, 9B, 9V, 11R, 12W, 13L; 970-10P; Tr. 8411; 8440; 33141; 42475; 42637-38; 41,536.

11. Exception is taken to any implication that Lehigh was the spokesman for any other respondent regarding this subject; or that the statements of Lehigh were representative of the attitude of others; or that Lehigh's statements were adopted or accepted by any other respondent. There is no evidence to support such implications.

12. Exception is taken to the failure to report the testimony on behalf of Lehigh explaining that the chaos and demoralization referred to in Com. Exs. 970-76 G, related to dealers retail prices and only incidentally to the manufacturers' prices (Tr. 26847-50).

13. Exception is taken to the inference that any or all respondents simultaneously discontinued deliveries to customers' trucks in or about August of 1932 or on any other single date since there is no evidence to support it. Exception is taken to the failure to report that the evidence shows the following:

Deliveries to customers' trucks were discontinued on different occasions by various mills in different parts of the United States prior to August 1932. A few of these include: Trinity, at Houston in 1928 (Tr. 32850-51); Universal Atlas, at Hannibal in 1930 (Com. Ex. 2649); Lone Star, at New Orleans in 1928 (Tr. 32852-55; Resp. Ex. 2356); Lehigh, at Union Bridge in June 1932 (Resp. Ex. 708); Alpha, at Ironton in December 1931 (Resp. Ex. 711); Missouri, at Sugar Creek in 1931 (Tr. 3437); Superior, Inc., in Washington in July 1931 (Com. Ex. 1204 A; see also exceptions to Paragraphs 7-81, *supra*).

14. Exception is taken to the failure to report the voluminous evidence showing that the abandonment of trucking and the use of an extra charge (where either or both occurred) were not the result of agreement, understanding or collusion, but resulted from independent and individual company action (Tr. 7276; 23689-90; 26852-53; 28135-38; 35674-77; 32288; 38150-52; 33848; 34551; 30631; 30643; 33141; 26871-72; 37862-63; 23714-16; 31025-26; 23653; 35683; 37131; 47912; 26183-84; 28543-44; 32866; 34556; 33845; 39845; 38915; 36176; 37549; 39582; 39706; 26892-93; 36487; 46667; 38728; 42046; 42199; 38908; 38919; 41628).

15. Exception is further taken to the failure to report in Paragraph 121 that the evidence clearly shows that in the areas where deliveries to customers' trucks have been discontinued, leadership was exercised by one manufacturer (see below) and others subsequently and independently followed for the reasons already shown. For example: Lone Star in Kansas (Tr. 32857-58; 26891-92); Ash Grove in Nebraska (Tr. 42042-44); Louisville in Indiana (Tr. 26885); Lehigh in the Northeast (Tr. 26853-61); and Penn Dixie in the Southeast (Tr. 38151-52; 39845). See also: Resp. Exs. 706-9; 711; 1357; 1359-60; 2356; 2399; 2502 B; 2555-56; 2661; 2970; 3061; 3590; Com. Exs. 2773; 2810; Tr. 7276; 23645-46; 23653; 23683; 23693-95; 23700-03; 23714-16; 27362-77; 26862-65; 26885-86; 28136-38; 31343-44; 32846-47; 32851-52; 33849-50; 32866; 33140-41; 33844-45; 34020; 34556; 35151; 35153-54; 35672-77; 35683; 36173-76; 36486-87; 37130-31; 39841; 39843-44; 39845; 42046; 42199; 46642-43; 46647-52; 46657-63; 46665-67).

19. Exception is taken to the use of the ambiguous phrase "this situation on the west coast", since it is not clear what situation is referred to and what geographical area is included in "the west coast".

20. Exception is taken to the statement "trucking is prohibited or discouraged by most of the western respondents", because it is not supported by the evidence or by the citations to Paragraph 122. Exception is further taken to the failure to report the undisputed evidence that where requests occur delivery to customers' trucks has continued

by respondents in Southern California (Tr. 42475-77; Resp. Ex. 3441; Tr. 8942-43; 8960); Northern California (Tr. 8738; 8682; 8775) and in Washington and Oregon (Tr. 8468; 8410).

21. Exception is taken to the failure to report in Paragraph 122 the abundant evidence regarding the circumstances which caused individual respondents independently to discourage and refuse delivery to trucks (see exceptions to Paragraph 120, *supra*); and to the further failure to report that the "inconvenience", "extra cost" and danger inherent in truck delivery at most plants were not incidental or secondary considerations, but that they seriously and adversely affected the operations of the mills in question (Com. Exs. 967 T, 11R, 12W, 13L; 969-9o; 12S; 970-2G; 975-18O; 19D; 976-28, 8K, 13Y; 1204 A; Resp. Exs. 2356; 2557 for id.; 3061; Tr. 6121; 6789-90; 7273; 8440; 8460; 8760; 23654-60; 26182-83; 27354-56; 27359-60; 27794-95; 28093-96; 28098; 28135; 28543-44; 29133-34; 29897; 30128; 30132-33; 30630-32; 30642-43; 31462-72; 32257; 32264; 32284-85; 32856; 32858-64; 33345-46; 33639-42; 33847-50; 35675; 35683-88; 35919-20; 36071; 36955; 37548-50; 37854; 37856-58; 38019; 38149-50; 38726-29; 38910; 38913-15; 39537; 39843; 41535-37; 41627-28; 41964-65; 42042; 42198-99; 42475-77; 46646-47). Exception is further taken to the failure to report regarding customer opposition to truck delivery, that such opposition was not passive or of incidental importance but that the loss and threatened loss of business if delivery to trucks were continued, was a major factor in the decision of many of the respondents who stopped it (Com. Exs. 969-8Y; 9O, 12S; 975-18o; Tr. 4138-39; 6342-44; 7268-70; 23660-62; 26181-82; 26847-50; 27795; 28137-38; 29131-32; 29881-82; 32851; 33342-48; 33844; 35139-40; 35154; 35188; 35689; 35919; 36954-55; 37130; 37862; 38019-20; 38049-51; 39582; 39781; 39843-44; 40069-70; 41537-38; 41626-27; 42042; 42045; 42114; 42199; Resp. Exs. 2662-68).

22. Exception is taken to the statement "even the return of empty sacks by truck was opposed as leading to difficulties" because of the unsupported inference it creates that more than one respondent "opposed" the return of empty sacks by truck.

23. Exception is taken to the failure of the Examiner to cite Tr. 8943 relating to California State Commission regulations regarding trucking rates.

24. The following citations in Paragraph 122 of the report do not bear on the statements for which they are cited: Tr. 8645; 8942; 9087; Com. Exs. 971-10Z; 2661 A; 1947; 286 G; Tr. 3432-39; 6802; 7277; 23671; 42375.

25. Further exceptions regarding truck delivery are stated in exceptions to Paragraphs 7-81, *supra*, relating specifically to the respective respondents.

"Diversions"

Paragraphs 123-129

1. Exception is taken to the statement in Paragraph 123 that respondents are practically unanimous in their opposition to diversions of cement in transit and in their practice of discouraging it because it is not supported by the evidence, including that cited.

2. Exception is further taken to the failure to report the evidence in this connection as follows:

Two kinds of diversion are possible: diversion in transit by the purchaser to a destination other than the one specified in the order; and diversion by a purchaser, from the specific job for which he has contracted for cement with price protection for that job, to some other job. Price protection for cement required in a specific job has been a matter of trade custom in the cement industry for thirty or more years. By their very nature, specific job contracts preclude diversions of cement from the job covered by the contract to some other job (Resp. Ex. 3788; pp. 1518; 1541; 1556; 1609; 1643; 1600; 1511; 1526; 1535; 1549; 1586; 1635; Resp. Ex. 1121; Tr. 26794; Resp. Exs. 2358 A-O; 2907 A-Z9; Resp. Ex. 1440 A-B; Tr. 28082; 23300-01; Resp. Ex. 3411 A-G; Tr. 42024-26; Resp. Ex. 2822 A-B; Tr. 37557).

The complaint is concerned with diversions of cement in transit from one destination to another. There is no

evidence whatever as to the attitude of the following 36 respondents toward diversions of cement in transit: Arkansas, Beaver, Calaveras, California, Castalia, Consolidated, Diamond, Florida, Georgia, Giant, Glens Falls, Great Lakes, Green Bag (Pa.), Idaho, Keystone, Monolith, Monolith Midwest, North American, Northwestern, Oklahoma, Oregon, Pacific, Peerless, Pittsburgh Plate Glass, Utah, Santa Cruz, Signal Mountain, Spokane, Standard, Three Forks, Trinity, Union, Valley Forge, Wabash and Yosemite.

A number of respondents have had express policies against diversions of cement in transit. These policies, however, long antedate the period of the complaint. Among such respondent companies are Alpha, since 1910 (Tr. 23301); Dewey, at least 28 years (Tr. 46634-35); Federal, always (Tr. 30627-28); Hawkeye, at least 23 years (Tr. 41625-26); Hermitage, since 1916 (Tr. 36237); Lone Star, always (Tr. 32774-5); Marquette, always (Tr. 40008-09); Medusa, always (Tr. 40057); Missouri, always (Tr. 37134); Nazareth, since at least 1924 (Tr. 28070; 27956); Northwestern States, always (Tr. 36487); Penn Dixie, since the company was formed in 1926 (Tr. 38233).

Other respondents have not found any diversion problem existing with regard to their shipments (Tr. 36953; 36487; 38817; 37546; 29120; 28579; 27812; 37134).

3. Exception is taken to the statement of the effects of diversion in transit as it does not fairly report the evidence. Exception is further taken to the assertion that diversions were opposed by "organized dealers" and to the failure to report the following:

When diversion in transit occurs, the cement is usually diverted to a destination where the seller's market price is higher than at the destination for which the cement was ordered and to which it was invoiced. By diverting the cement the purchaser obtains a price concession which results in a discrimination against other customers located at the destination to which the cement was diverted (Tr. 23302-03; 38233; 32774-75; 42880; 37641-44). This concession is then used to undersell competing dealers in the same market (Tr. 6587-88; 40592; 37643; 36041). This al-

ways causes the injured customers of the seller to complain vigorously. Anti-diversion policies have largely arisen to prevent this discrimination (Tr. 46635; 41626; 6639-40; 40057-58; 42312; 38233; 38720; 29122-25; 28670-72; 41522).

Some respondents have a broad policy of protecting the natural markets of their dealer customers from invasion by dealers from other areas who are not equipped to serve those markets regularly. The prevention of diversion in transit by such respondents has been a natural incident to that policy (Tr. 13731-34; 30628; 29539; 41625-26; 42312-13; 27248; 29122-25; 39839-40; 38989-90; 27812; 36040; 41526-27; Resp. Ex. 523; Tr. 23314-16; 36215-16; Resp. Exs. 2679-93; 3788, pp. 1513, 1530, 1566, 1588, 1623).

Diversions in transit also constitute a fraud on the manufacturer because the customer obtains the cement on the basis of misrepresentation (Tr. 13627; 6639-40; 28406; 29120-21).

4. Exception is further taken to the failure to report the evidence offered by respondents showing that the development and use by each respondent of its policy regarding diversion in transit was independent, and was not the result of any agreement, understanding or collusion (Tr. 23332; 26442; 32408; 30627; 39706-07; 47132-34; 41626; 36953; 38234-40; 37134; 39509-10; 39580; 36487; 38817; 46637; 29121-22; 29538; 42899; 37644; 36041; 29538; 38720; 41553; 41526; 48101-07; See also exceptions to Paragraphs 7-81, *supra*).

5. Exception is taken to the unsupported inference that the "price structure" of manufacturers was disrupted and to the failure to report that dealer prices, not manufacturers' prices often were affected (See citations to Exception No. 3, *supra*).

6. Exception is taken to the unsupported inference in Paragraph 123 that when a diversion takes place a manufacturer does not lose the difference between the net he receives on the diverted shipment and the net he would have received had the shipment been sold at the delivered price in effect at the destination to which it was diverted.

7. The following citations do not support any part of the statement for which they were cited in Paragraph 123; Tr. 6587; 6698-700; 7966; 7973; 7665-66; 23324-36; Com. Exs. 828-7E; Tr. 38242.

8. Exception is taken to the statement "many respondents claimed the right to prevent diversions unless made with the consent of the shipper" because it is not supported by the citations accompanying this paragraph or any other evidence.

9. Exception is taken to the statements in Paragraph 124 regarding the Crutchfield-Beeson Hardware companies incident and to the failure to report that it was merely a controversy which arose solely from Medusa's effort to protect an injured customer. Further exception is taken to the failure to report that Medusa witnesses testified and produced contemporaneous documentary records regarding this matter showing the following:

In September 1936, Medusa consigned a carload of its cement to the Crutchfield Hardware Company, a dealer, at Thomasville, North Carolina. At the request of the Crutchfield Company the High Point, Thomasville & Denton Railroad diverted the car to High Point, North Carolina (Resp. Exs. 3334; 3347). The dealer sold the diverted cement to a customer of a Medusa dealer, Beeson Hardware Company, at High Point for a job at High Point on which this dealer had already made deliveries under contract (Resp. Ex. 3337; see also Resp. Exs. 3344; 3346; 3347). As a result of the interference with its contract, the Beeson Company lost the anticipated profit on the transaction and in addition was induced to reimburse the customer for the difference between the price of the cement already delivered on the contract and the lower price of the diverted cement (Resp. Ex. 3344). Consequently the Beeson Company complained bitterly to Medusa (Resp. Ex. 3334) and persuaded Medusa's local salesman to take up the matter with the railroad's agent. The agent admitted that it was an error for the railroad to have permitted the diversion, which was contrary to a provision on the shipment's bill of lading, and he promised that the railroad would pay the Beeson Company for their loss

(Resp. Ex. 3347). The Beeson Company turned over its claim to Medusa for collection (Resp. Ex. 3346), and Medusa paid it pending the reimbursement promised by the railroad (Resp. Exs. 3337-39; 3344; 3348 A-B). Later the railroad balked at payment (Resp. Exs. 3335-42; 3348 A-B; Com. Ex. 546 Q). After Medusa again pointed out that this diversion violated the terms of the bill of lading and had refused to route further shipments over the railroad the claim was paid (Com. Exs. 546 P, o, M-N, L, K).

10. Exception is further taken to the statement that High Point was "nearer freight-wise" than the point of origin, because it is not supported by the evidence or any of the citations.

11. Tr. 23337 cited, has nothing to do with the matters reported in Par. 124.

12. Exception is taken to the failure to report that the evidence is that the bill of lading stamp used by some companies to prohibit diversions of cement in transit was not adopted or used as the result of agreement or understanding among respondents (Tr. 41626; 42899; 23335; 46638-39; 30627; 29538; 41647; 36237; 33575-76; 36953; 38991; 41553; 37547; 41105; 39578-80; 48101-07; 28092-93; 38720; 38240; 38247; 38249).

13. Exception is taken to the statement in Paragraph 125: "Prior to 1935 the railroad had refused to accept bills of lading containing restrictions against diversions . . ." because it is not supported by the evidence or the citations given and because the uncontradicted evidence shows that a stamp on bills of lading forbidding diversions had been used as early as 1930 (Resp. Exs. 3040-41; Tr. 39579-80; 39783).

14. Exception is taken to the failure to report that no one in the Penn-Dixie organization had anything to do with the initial recognition by railroads of the use of a bill of lading stamp (Tr. 38250-51).

15. Exception is taken to the failure to report the evidence showing that the statement "initiate a smooth working arrangement" quoted in Paragraph 125, referred

to an "arrangement" between the respective railroads and an individual cement manufacturer and did not as suggested by the report, refer to any cooperative arrangement among any respondents (Resp. Exs. 2908 C; 2908 E).

16. Exception is further taken to the failure to report that prior to Mr. Browder's notification to railroads dated May 24, 1935, the Penn-Dixie Company was notified of the approval of a bill of lading stamp by the Association of American Railroads through the medium of a circular letter from the Lehigh and New England Railroad Company, dated April 2, 1935 (Resp. Exs. 2908 A-B).

17. Exception is taken to the implication in Paragraph 126 that Mr. Browder originated or devised the bill of lading stamp referred to, or that he made the railroads aware of it. There is no evidence to support this implication and the only evidence is to the contrary, *i. e.* the Lehigh and New England R. R. notified Mr. Browder on April 2, 1935 of the approval of such a stamp by the Association of American Railroads (Resp. Exs. 2908 A-B). Resp. Ex. 2908 E shows on its face that Penn-Dixie was notifying the railroads that it was availing itself of the privilege of using the bill of lading stamp and not, as suggested by the misleading excerpt in Paragraph 126, that it was notifying the railroads that the use of such a stamp had been approved by the Association of American Railroads.

18. Exception is further taken to the statement in Paragraph 126 that "the practice was then extended to Penn-Dixie's southern mills and their competitors' mills" because it is not supported by the citations in the report or by other evidence but, on the contrary, the evidence shows that such a stamp was in use by at least one southern respondent since 1930 (Resp. Exs. 3040-41; Tr. 39579-80; 39783) and by another southern respondent six or eight months prior to Browder's letter of December 1935 (Tr. 36232-36; Resp. Exs. 2696-97).

19. Exception is taken to the failure to report the evidence showing that the adoption of the bill of lading stamp by those respondents which did adopt it, was independent and without understanding or agreement (See

Exception No. 12, *supra*). Exception is taken to the failure to report the following further evidence:

After the railroad Traffic Executive Committee—Eastern Territory—approved the recommendation of the Traffic Advisory Committee of the Association of American Railroads that bills of lading containing a non-diversion stamp be accepted by carriers (Resp. Exs. 2908 A-C), traffic managers of various railroads notified several respondents that this stamp would be accepted on bills of lading. The New York Central and other railroad officials informed Medusa that other industries were using a stamp to prevent diversions and Medusa began using the stamp thereafter (Tr. 41102-03). The Missouri Pacific Railroad suggested that the Dewey Company use the stamp to prevent diversions (Resp. Exs. 3585 A-B; Tr. 46636-37). The bill of lading stamp was called to the attention of Nazareth by the Delaware, Lackawanna & Western Railroad (Tr. 28092-93). Penn-Dixie was informed by the Lehigh & New England Railroad that it would be permitted to use the stamp (Resp. Exs. 2908 A-B, F; Tr. 38243-44). Alpha was also so informed by several railroad traffic managers (Tr. 23334-35). Certain other respondents learned of the stamp when they received delivery of materials bearing the stamp and they began using it thereafter (Tr. 36232-36; Resp. Exs. 2696-97; Tr. 41642; 38991).

20. Exception is further taken to the failure to report in Paragraph 126 as follows: At least four respondents were shown by undisputed evidence never to have used a bill of lading stamp prohibiting diversions (Superior, Inc., Tr. 42899; West Penn, Tr. 27812; Whitehall, Tr. 28588-89; Wolverine, Tr. 36041) and there is no evidence whatever regarding the use of such a stamp by 49 other respondents: Aetna, Allentown, Valley Forge, Arkansas, Ash Grove, Beaver, Bessemer, Calaveras, California, Consolidated, Cumberland, Diamond, Edison, Florida, Georgia, Giant, Glens Falls, Great Lakes, Green Bag of Pa., Hercules, Idaho, Keystone, Missouri, Marquette, Monolith Mid-West, Nebraska, North American, Northwestern, Northwestern States, Oklahoma, Oregon, Pacific, Peerless, Pittsburgh Plate Glass, Utah, Riverside, Santa Cruz, Signal Mountain,

Spokane, Standard, Three Forks, Trinity, Union, Universal-Atlas, Vulcanite, Volunteer, Wabash and Yosemite.

21. Exception is taken to the failure to report that Paragraph 14 of The Cement Institute Code of Ethics provided that diversion of cement in transit was an unfair trade practice because it was "discriminatory as between purchasers or users" (Com. Ex. 138 S).

22. Exception is taken to the inference in Paragraph 127 that there was any connection between the Code of Ethics of The Cement Institute and the NRA Cement Code. There is no evidence to support it and there is none cited.

23. Exception is taken to the implication in Paragraph 128 that the Compendium was "employed", or "adopted" by any respondent since all the evidence is to the effect that most respondents paid no attention whatever to the Compendium and there is no evidence that any respondent either employed it or adopted it (See exceptions to Paragraphs 1; 7-81, *supra*).

24. Exception is taken to the inference in Paragraph 129 that freight is prepaid by all respondents, or by any respondent, for the purpose of preventing diversions and to the failure to report the undisputed evidence that prepaid shipments relieve the customer from making a cash outlay for the amount of the freight charge before obtaining delivery; that prepayment of freight was independently initiated by one manufacturer to gain a competitive advantage; and that it proved to be such a competitive advantage that other competitors were forced to adopt the practice or lose their customers (Resp. Exs. 2990; 2792; Com. Ex. 2726; Tr. 29862-63; 29874-75; 29893-95; 30710; 31336-37; 31908-09; 31992-95; 34445-47; 36169; 36172-73; 36574-76; 37104-05; 37158-64; 37527; 38939; 40345-48; 42195; 42488-89; 42907-08; 46471).

25. Exception is further taken to the inferences in Paragraph 129 that all respondents demanded the return of receipted freight bills since the evidence affirmatively shows that some respondents did not require the return of receipted freight bills; and the evidence further shows that

the practices of other respondents differed (Tr. 42906-07; 38992; 38240-41; 38938-39; 42244-45; 46783; 36158-61; Resp. Exs. 2658-60; see also exceptions to Paragraphs 7-81, *supra*).

The Trial Examiner struck from the record or rejected further evidence of respondents regarding prepayment of freight (Resp. Exs. 3375 A-S for id.; Tr. 30711; 36576; 38939-40; 39075; 39039-40; 39059; 39539; 39600; 41515; 41619-20; 41698; 42195-96; 42218; 46471).

"F.O.B. Mill Prices"

Paragraphs 130-138

The statements in Paragraphs 130 through 138 are based in large part upon erroneous assumptions and conclusions, which are not supported by the evidence and which contain many unfounded inferences and suggestions. Several statements and implications are common to all or some of Paragraphs 130 through 138. In order to avoid duplication and to correct the basic misconceptions and inconsistencies of these sections at the outset, Exceptions No. 1-27, following, are grouped and intended to apply to Paragraphs 130 through 138 or portions thereof as indicated.

1. Exception is taken to the failure to report the following undisputed evidence which is essential to an understanding of the subject matter of Paragraphs 130-138.

The federal government, like all other purchasers, makes awards on the basis of the lowest cost laid down at destination regardless of the type of bid requested or received. In addition to the reasons which impel other purchasers to make awards on this basis, purchasing agents of the federal government are bound to do so under the provisions of Revised Statutes, Section 3709 and the decisions of the Comptroller General. When the cost at destination to the government under an f.o.b. mill bid, however, is the same as a price bid f.o.b. destination, the government will buy at the f.o.b. destination price in order to avoid the expense incident to arranging transportation and delivery under an f.o.b. mill bid (Tr. 28048-52; 2480-81; 1722; 10307-11; 10455-58; 27067; 1313-19; 39094-96; 39248; 2452-54; 9506-

08; 5452-63; 180-84; 212-14; 32672-74; 40059; 32703; Com. Exs. 127; 168 C; 169; 174 A; 175; 176; 267 B; 268 A, F; 375; 772; Resp. Exs. 219; 302; 384; 802; 805-06; 809; 1082; 2285; 2349; 2351; 2998). Other evidence to this effect was excluded by the Trial Examiner (Resp. Ex. 2833 for id.)

All bidders, whether respondents or non-respondents, are aware of this policy of the federal government. Consequently manufacturers do not bid unless they believe that they can submit a bid under which the cost to the government laid down at destination will be as low as or lower than competitors' bids (Tr. 1321-22; 40084; 12774-76; 41555-56; 28048-52; 6637-9).

Prior to the filing of the complaint in this proceeding, the federal government did not request f.o.b. mill prices, nor make any f.o.b. mill awards unless transportation savings were available (Tr. 5483-84; 39002-03; 27062-67; 212-14; 10005-8; 38434; Com. Exs. 374-75).

It has been the experience of all sellers that the government usually asks for destination prices (Tr. 47902-10; 36813; 37568-70; 37645; 32126-43; 32418-20; 32540-43; 30100; 40058-59; 40370-72; 28635-36; 32672; 37701; 37889; 38749; 38802-4; 36548-9; 27941-2; 42053; 35908; 36068-70; 27578; 27618-19; 35640; 35795; 46527-29; 28956; 38433-34; 24078; 21280-85; 1574-77; 34429; Com. Exs. 178; 378-84; 983 D; 1082; Resp. Exs. 223; 234; 361-66; 762; 774; 2885; 3164; 3680-90; 3720).

Other evidence to this effect was excluded by the Trial Examiner (Tr. 37580-83; 32140; Resp. Exs. 223; 2295-2302).

Respondents customarily sold f.o.b. mill to the federal government to the extent requested (Tr. 20820-45; 21576-625; 36319-24; 39012-13; 39365-8; 42614-26; 42592-97; 42644-52; 27085-98; 27101-06; 27286-87; 27067; 27074-81; 39042-45; 39977-80; 140-43; 41872-73; 1529-32; 3535-36; 263-69; 305; 1245; 1257-59; 38444; 39654-56; 39719-20; 32721; 32724; 36353-57; 39859; 39918-9; 2339-40; 41714-21; 1703-6; 8670-72; 8455-57; 24204-05; 46533-34; Com. Exs. 112; 118; 119; 120; 124; 125; 127; 135; 169; 277-2 C; 2 L-M; 329; 366 M-o; 796; 3260; 3261; 3262 A-C; Resp. Exs. 273; 290; 292; 295-97; 340; 344-5; 350; 355; 384; 801-04; 2829-34; 2998; 3005-06; 3166; 3168; 3386; 3447-49; 3782; 3785; see also citations to Exceptions No. 7-9, *infra*).

Other evidence to this effect was excluded by the Trial Examiner (Tr. 21587; 21599-603; 32729½-737; 40272-83; Resp. Exs. 235-42; 246-7; 341-3; 2829-39; 3002-3; 3165; 3169-77; 3434; 3660).

2. Exception is taken to the statement that the revelation of "price inequalities" is a disadavantage of f.o.b. mill prices and to the suggestion that so-called "price inequalities" are any more apparent in f.o.b. mill prices than they are in delivered prices. There is no basis for either the statement or the implication in the evidence and none is cited.

3. Exception is taken to the suggestion that the Institute proposed the NRA Cement Code, because the evidence shows that the Code was proposed by the cement industry, and the Institute was merely the vehicle required by law for its submission to the government for approval (See exceptions to Paragraphs 1, 3, 4, *supra*).

4. Exception is taken to the suggestion resulting from the omission of facts in Paragraph 130, that the NRA Code prevented or prohibited f.o.b. mill prices, and to the failure to report that the NRA Code as finally approved by the Government and the industry, permitted the filing and quoting of f.o.b. mill and f.o.b. destination prices in the discretion of the filing party; that the Code was construed in this manner by NRA, the Code Authority, and members of the industry; and that f.o.b. mill prices were filed and quoted by respondents under the Code (Tr. 3053; 3336-37; 16981-89; 39979-80; 17000-02; 17099-110; 35926; 17145-47; 86; 91; 41673; Com. Exs. 557; 622 E; 716 A; 164 I-J; 840 I-K; 937 D-E; 127; 133-34; 753 E; I-L; 795; Resp. Exs. 1317; 2422).

Other evidence to the same effect was excluded by the Trial Examiner (Resp. Exs. 171 A-E for id.).

5. Exception is taken to the misleading impression created by the selection of disconnected excerpts from the draft of the NRA Code and to the omission of the paragraph intervening between the quoted excerpts.

6. Exception is taken to the unwarranted interpolation of the words "price cutting" as synonomous with unfair competition in the quotation from the Code draft in

Pargraph 130. This is a conclusion unsupported by the evidence. Exception is further taken to the implication that "price cutting" or rebating is any more likely in f.o.b. mill sales than in delivered price sales. There is no support for such implication in the evidence, or in fact.

7. Exception is taken to the unsupported and erroneous assumption underlying all of Paragraphs 131-138, that the government is not sold at an f.o.b. mill price (a) unless it is charged the same price on all sales regardless of the place where it intends to use the cement and (b) unless a definite f.o.b. mill figure is incorporated in the bid itself instead of being left to the government to compute by means of a "control clause"; or (c) in any case, if in computing the f.o.b. mill price the seller took into consideration the probable ultimate cost at destination.

8. Exception is taken to the unsupported statement and conception that a destination cost in a bid to the government is a "delivered price" and to the failure to report that the evidence was to the contrary (Tr. 47595-97; 9479-85; Com. Ex. 110; also exception 24, *infra*).

The matters to which exception is taken in 7 and 8, *supra*, involve conclusions of law and are not supported by the evidence. Moreover, they are purely arbitrary and directly contrary to the position taken in the other portions of the report, including Trucking (Paragraphs 120-121); sales to commercial customers (Paragraph 130); sales to railroads (Paragraph 138) and sales to the United States Government prior to the Code (Paragraph 138).

9. Exception is taken to the failure to report the following evidence which contradicts and destroys the foregoing and other unsupported assumptions and conclusions in Paragraphs 130-138 regarding f.o.b. mill bids to the government:

A sale in the cement industry is regarded by both buyers and sellers as an f.o.b. mill sale when title passes at the mill and delivery is made at the mill. The price at which such a sale is made is regarded by buyers and sellers as an f.o.b. mill price (Tr. 32697; 2476-7; 21126-27; 21132-

35; 7278-79; 197; 1723-25; 1805; 8150; 24392-93; 2340-43; 38148; 38439).

Title passes at the mill on sales to the United States Government whenever the government so desires and in such cases the government is invoiced at an f.o.b. mill price, takes delivery at the mill and arranges and pays for the transportation (Tr. 7278-79; 1723-25; 1805; 2340-43; 24392; 11455; 197; 27066-68; 6663-64; 1840-41; 38148). The evidence is overwhelmingly to the effect that in such cases cement buyers and sellers consider that the government is sold f.o.b. mill, regardless of whether or not the seller may have derived his mill price from a consideration of the factors which will affect the ultimate destination cost and regardless of whether or not a "control clause" is used (Tr. 263-69; 21612-26; 27071-74; 3508-29; 2477; 2340-43; 31191-93; 31289-93; 42626; 27066-68; 27082-84; 24130-31; 36319-20; 6668; 39918; 47591-97; 35573-74; 3144-45; 3681-83; 38434; 38439; 21134-35; 21630-42; 5476; Resp. Ex. 219; Com. Exs. 18 B; 19 B; 110; Resp. Exs. 893; 894; 2285). Other evidence to the same effect was stricken by the Trial Examiner (Tr. 39859).

10. Exception is taken to the statement in Paragraphs 131-135 that it became the general practice of all respondents affected by land grant rates to use a "control clause" because it is not supported by the evidence and also because it fails to specify which respondents were in fact "affected by land grant rates" and what is meant by the word "affected". Exception is further taken to the failure to report the following:

Twenty nine respondents do not sell and have not sold cement in territories where land grant rates are available on shipments from their own or competing mills: *Bessemer, Castalia, Coplay, Diamond, Edison, Federal, Giant, Glens Falls, Great Lakes, Green Bag (Pa.), Green Bag (W. Va.), Hercules, Idaho, Keystone, Lawrence, Nazareth, North American, Peerless, Pittsburgh Plate Glass, Portland of Utah, Southwestern (Osborn), Standard, Superior (Ohio), Valley Forge, Vulcanite, Wabash, West Penn, Whitehall* and *Wolverine* (Tr. 7290; 30625; 26174; 28529; 37887; 38030; 27750; 35913; 28047; 27483-85; 35798; 32173-74; 28971; 29525; 34325; 2157-60; 274; 39087; 33984).

As to three respondents (*Monolith Midwest, Union* and *Riverside*) the only evidence shows that they never used a "control clause" (See Com. Exs. 125; 127; 134; 135; 3261 N-o, S; Resp. Exs. 290; 296; 302).

Fourteen rspondents (*Aetna, Beaver, Calaveras, Hawkeye, Medusa, Monolith, Northwestern States, Oregon, Pacific, Petoskey, Santa Cruz, Spokane, Superior Inc.,* and *Yosemite*) have not used a "control clause" on any occasion since the time of the *Schechter* decision. As to the remaining respondents the evidence shows that since 1935 they have not used a "control clause" continuously or on all bids and that the tendency has been for individual respondents gradually to abandon the use of a "control clause" (Tr. 20820-45; 21576-625; 36319-24; 39012-13; 39365-68; 42614-26; 42592-97; 42644-52; 27085-98; 27101-06; 27286-87; 27067; 27074-81; 39042-45; 39977-80; 140-43; 41872-73; 1529-32; 3535-36; 263-69; 395; 1245; 1257-59; 38444; 39654-56; 39719-20; 32721; 32724; 36353-57; 39859; 2339-40; 41714-21; 1703-06; 39918-19; 8670-72; 8455-57; 24204-05; 46533-34; Com. Exs. 112; 118; 119; 120; 124; 125; 127; 135; 169; 277 2C; 2 L-M; 329; 366 M-o; 796; 3260; 3261; 3262 A-C; Resp. Exs. 273; 290; 292; 295-97; 340; 344-45; 350; 355; 384; 801-04; 2829-34; 2998; 3005-06; 3166-68; 3386; 3447-49; 3782; 3785). Other evidence to this effect was excluded by the Trial Examiner (Tr. 21587; 21599-603; 32729½-737; 40272-83; Resp. Exs. 235-42; 246-47; 341-43; 2829-39; 3002-03; 3165; 3169-77; 3434; 3660).

Most of the bids involving land grant rates submitted since the code have been non-identical when compared on the basis of the cost to the government laid down at destination (See citations to preceding paragraph; also Tr. 8947; 42470; 42478; 42611-13; 42644-52; 42778-79; 36320-24; 31968-69; 1244-45; 312-16; 325-26; 13411; 13469-70; 39371-72; 39004-05; 137; 8637-38; 8455-56; 39094-47; 2339-40; 1783-85; 1825; Com. Exs. 176; 1156; Resp. Ex. 302).

11. Exception is taken to the unsupported assertion and the implied assumption in Paragraphs 131-133 That the purpose of the "control clause" was to enable respondents to submit identical bids (See Tr. 42402-08; 16982-89; 3702-10; Com. Exs. 159 [16-18; 20-22]; 277 D-E, K-L; 398 A-B,

E; 400 B-D; 557 (Art. IX, Sec. 3); 716 A-B; 718; 753 C, L; 1037; 840 H-K; See also Exception 10, *supra*).

12. Exception is taken to the failure to report in Paragraphs 131-134 that in comparing bids on a destination basis the government uses land grant estimates which are neither the "correct" rate nor the "actual" land grant rate (Tr. 244-45; 2263-64; 174-76; 1279; 3706-7).

13. Exception is taken to the failure to report in Paragraphs 131-134 that the "control clause" was nothing more or less than a requirement that the government deduct the rate it actually employed in comparing bids (Tr. 47694-97; 47603-04; 2259-64; 1261-73; Com. Exs. 1099 D-Q; 399 2Q-R; 95 B).

14. Exception is taken to the failure to report in Paragraphs 131-134 that non-respondents participated in open price filing with the Code Authority and Trade Practice Committee (Tr. 41475-77; 41479; 17102; 17109; Com. Exs. 171 A-C; 399 2B-C).

15. Exception is taken to the statement in Paragraphs 131 and 132 that the destination cost is arrived at "by taking the prevailing *destination price* (based on commercial freight rate), subtracting commercial freight, and adding the estimated land grant rate", on the ground that it is not supported by the evidence. Exception is further taken to the failure to report that no so-called formula was consistently or generally used or adhered to (Tr. 9026-31; 42611-13; 42644-52; 42788-79; 41872-73; 21301-05; Com. Exs. 164-69; 329; 387 J; Resp. Exs. 18-19; 3386; 3051; see also exceptions to Paragraphs 88-92, *supra*).

16. Exception is taken to the report in Paragraphs 132-133 that "the estimated land grant rate used to make up the '*destination cost*' . . . was higher than the actual land grant rate" on the ground that it is not supported by the evidence (Tr. 3706-07; 47598; 31987-89).

17. Exception is taken to the report in Paragraphs 132-133 that the government was deprived of "a part of its land grant advantage" where the "estimated rate used to make up the 'destination cost' . . . was higher than the actual land grant rate" because "the actual rate would have been

added on a true f.o.b. mill bid", and because this discrepancy in rates "netted the mill more per barrel than it received on commercial business. There is no evidence to support this.

18. Exception is taken to the report in Paragraphs 132-133 that the actual rate is "added" on a true f.o.b. mill price, whereas, by implication, it is not "added" where a destination cost bid is used; and to the failure to report that the actual rate is used or "added" on every land grant shipment, including destination cost bids (Tr. 3706-7; see Exception No. 24, *infra*).

19. Exception is taken to the report in Paragraphs 132-133 that respondents have netted more per barrel on government sales than on commercial business due to the use of erroneous land grant information, on the ground that this statement is not supported by the evidence.

20. The following references in Paragraph 132 do not support the propositions for which they are cited: Tr. 1279; 1795; 3381; 2331; 2349 and 3704.

21. Exception is taken to the unsupported implication in Paragraph 132 (in conjunction with Paragraph 82) that the evidence cited to show that small gains are sometimes made by the government is typical of the other evidence in the record on this point.

22. Exception is taken to the failure to report the existence of certain factors which more than offset the fractional loss of land grant benefits which is reported in Paragraph 132 to result from the use of erroneous land grant rate estimates. These factors, shown by the evidence, are:

The amount of variation between the "estimated" and "actual" land grant rate is always very slight. In some cases the estimate is more than the actual rate and in some cases it is less. Over a period of time the gains will cancel out the losses (Tr. 31987-81; 35537-8; 35574-77; Com. Exs. 157; 180; 339; Resp. Exs. 895; 897; 978; 2284 A; 2286; 3046 B; 3048).

Bidders tend to use the lowest land grant rate made available to them from any source in order to be competi-

tive (Tr. 39085; 39216; 39797; 36332; 36349-50; 36353-4; 31843; 31846-47; Com. Exs. 841 I-K). Other evidence to this effect was excluded by the Trial Examiner (Tr. 39019-21).

The practice of dropping all fractions in bidding destination costs results in lower destination costs and thus favors the government (Tr. 4062-64; 35538-39; 38444-46; 25329-30; Com. Exs. 157; 180; 366 B; 369; Resp. Exs. 894-97; 2284-86; 2538 R; 2540; 3046 A; 3048). Other evidence to the same effect was excluded by the Trial Examiner (Resp. Exs. 2924; 2541).

The government deducts its own approximation of land grant rates in making the awards and purposely uses a figure larger than its own best estimate of the land grant rate in order to offset any error the bidder might have made (Tr. 174-76; see also Exception No. 24, *infra*).

23. Exception is taken to the failure to report in Paragraphs 132-133 that the government obtains the full benefit of land grant rates whenever it ships cement on a government bill of lading at the reduced rate and that this occurs whenever a destination cost is bid and an award is made at the f.o.b. mill price (Tr. 1793-4).

24. Exception is taken to the statement in Paragraphs 132 and 134 unsupported by evidence, that the destination cost is fixed; that it cannot be reduced or raised in case of difference in rate computations and that the "control clause" by it terms produced a figure for invoicing purposes which was not what the shipper actually received. Further exception is taken to the failure to report that in making an award the government subtracts the purchasing agent's estimate of the land grant rate from the destination cost bid, to arrive at an f.o.b. mill price. The eventual cost to the government amounts to the sum of this mill price and the actual settlement rate; and any variation between the purchasing agent's estimate and the actual settlement rate is reflected in the destination cost and not in the f.o.b. mill price (Tr. 244-5; 1261-73; 1279; 1312-13; 21639-42; 2260-64; 2282-88; 2419-26; 2463; 174-76; 35512-16; 35523-4; 3404-5; Resp. Exs. 2536; 2537 R-S; Com.

Ex. 548 3B; 334 A-C; 170). Other evidence to this effect was excluded by the Trial Examiner (Tr. 35526-8).

27. Exception is taken to the failure to report in Paragraphs 136 and 138 that the government has allowed bidders to equalize bids and has allowed railroads to equalize rates; and that government purchasing agents expressed the belief that equalization should be allowed (Tr. 2453; 1822-23; 1827; 47798-800; 23042-43; 27076-81; 27088-90; 27164-67; 32721; 32735-37; Com. Ex. 365; Resp. Ex. 1341; for typical invitation forms see Resp. Exs. 355 E; 3449 C; 801).

28. Exception is taken to the implication in Paragraph 131 that any so-called formula was responsible for identical prices during the Code period and to the failure to report that while open price filing was in operation such identity was merely the result of the voluntary meeting of the lowest price filed by each of the bidders (Tr. 199-200; 1238; 40060-61; 39042-45; 24200-01; 41475-77; 41479; 36815; 39674-75; 36325; 39858-59; Com. Exs. 163 I; 399 A, Y-2Z; 164 D-E; 820 H; 277 G-H, K-M; Resp. Exs. 2993-94; 3050; 3396). Exception is further taken to the failure to report that during the operation of open price filing there were numerous identical bids which were not reducible to any formula (Tr. 41757-64; 1366-68; 37911-17; 37993-96; Com. Exs. 111; 133; 134; 162; 164-66; 168 A; 178; 399 A; 937 D-E; Resp. Exs. 751; 752; 3396; 3624; 3784).

29. Exception is taken to the failure to report in Paragraph 131 that shippers are independently able to determine land grant rates (Tr. 24195-97; 33307-09; 47014-19; 47410-11; 1305; 25130-31; 31828-30); and that the railroad division sheets are available to them (Tr. 2466-67; 24935-36; 47418-20; 32722; 31807-11; 31820-21; 31826-27; 39217; Com. Exs. 3230-32; Resp. Exs. 2246-47; 1322; 1329). Other evidence to this effect was excluded by the Trial Examiner (Tr. 39019-20; Resp. Exs. 2252-53 for id.).

30. Exception is taken to the statement in Paragraph 131 that the government refused to give out land grant information and to the failure to report the following evidence:

The government published land grant information in printed volumes listing land grant percentages (Tr. 33308-09; 47014-15; 47774-75; 31812-13; 31820; 42781; 32723; 39017-18; Resp. Exs. 1329; 1348; 2248-50).

The land grant rates used by the government in comparing bids are generally shown on the abstract of bids and therefore known and available to the shippers for future use (Tr. 1750; 37128-29; 38435-39; 38504-05; 39654-56; 25803-05; 42121-22; 32722-24; 36311; 36324-26; 25041; 25168-69; 25153; 25228-29; 25234; 25278; 27040; 35528-29; 31828; 31960-5; 21654; 46534-35; Com. Exs. 125; 157; 169 A; 180; 792; 841 I-K; 120; 124; 129; 135; 765-67; 769-72; 776-78; 780-83; 785-89; 791; 1330; Resp. Exs. 241; 244; 290; 292; 296-97; 302; 344; 350; 371-73; 855; 862; 886; 1064; 1066; 1071; 1318; 2350; 2706). Other evidence to this effect was excluded by the Trial Examiner (Resp. Ex. 825 for id.).

31. Exception is taken to the failure in Paragraph 131 to report the evidence showing the further availability of land grant rate information to shippers as follows:

Land grant rate information is fully available to railroads as well as to the government (Tr. 2517; 38505-06; 32722-23; 47774-75; 47790-95; 8965; 24196; 6646-47; 47778-82; 47796; 31828-30; Com. Exs. 3230-32; Resp. Exs. 1322; 1329). Other evidence to this effect was excluded by the Trial Examiner (Resp. Exs. 2252-53; 3623).

In addition, the settlement rate on past transactions (erroneous or not) is known to railroads at all destinations where shipments have previously been made, from the payments by the government on such prior shipments. Railroads keep a record of all payments received from the government and notify any shipper, upon request, of the land grant rates thus made known (Tr. 47800-01; Resp. Exs. 1335 E; 1322 F). Other evidence to this effect was excluded by the Trial Examiner (Resp. Ex. 2254 for id.).

32. Exception is taken to the failure to report in Paragraph 131 that individual respondents independently obtain land grant rate figures from the railroads (Tr. 47775-78; 47801; 204-05; 2520-23; 37128-29; 42878; 42472-73; 25336-37; 31894-95; 42780-82; 39015-17; 42335-36; 38435-39; 24195-97;

39654-56; 25784-85; 25803-05; 8650-51; 21143-44; 5055; 32722-24; 38764; 41768; 41770-73; 36324-26; 47021; 47025-28; 47414; 47418; 6646-47; 25041; 25168-69; 25302; 25327-29; 25332; 25341; 25363-68; 25388-89; 4532-33; 31828; 31830-46; 31899; 31901-02; 31904-05; 31960-65; 27041-43; 47597-99; 46534-35; 39363-64; 42121-22; 38504; 35528-29; Resp. Exs. 895-97; 899-901; 910-14; 921-29; 940-43; 949; 951-52; 962-67; 976; 978; 980; 1320-28; 1330-47; 2251; 2254-55; 2284; 2286; 2826-28; 2835-39; 3048; 3397-A; 3398; 3624-26; Com. Exs. 562-7L; 841 1-K; 564 B-D, G, I, O-T, V, Z, 2C-D, 2J-K, 2N, 2R-Z, 3A, 3E-G, 3I-L, 3P-R, 3T-U). other evidence to this effect was excluded by the Trial Examiner (Resp. Ex. 2254 for id.).

33. Exception is taken to the statement in Paragraph 131 that f.o.b. mill bids involving land grant rates always "run the risk" of being a cent or more lower or higher per barrel. There is no evidence that any individual bidder ran any "risk" where his bid was lower than his competitors, or that bidders feared they were running any "risks" by being lower than competitors. The "risk", if any, involved in being higher was to lose all chance at the business (Tr. 47599-601; 47410-11; 27073-76).

34. No exception is taken to the Examiner's report in Paragraph 132 that some respondents filed the "control clause" with the Code Authority, and that it was done in order to permit the use of land grant rates. This portion of the report is supported by the weight of the evidence in so far as it can be taken to mean that the "control clause" was inaugurated by the individual action of one respondent and was independently adopted by other respondents when they learned of it through price filing under the NRA Code.

35. Exception is further taken to the failure to report the following:

Signal Mountain was the first company to use the "control clause", filing it with the Code Authority on March 9, 1934 as a condition of its bid for the TVA letting of March 15th (Tr. 47592-93; 47606-08; 3052; Com. Exs. 397; 159). Other respondents filed and used this clause in subsequent lettings during the months of April, May and June 1934.

There was a lag, however, between the dates of adoption by the other respondents. (Com. Ex. 792; Resp. Exs. 753; 888; 18 B; 19 B; 2293; 2294; 2295; Com. Exs. 114; 399-2J; 2U; 399 P-3A; 164 D-E; G-W; 165; 162; 193; 166; 753 M-N; 192; 794; 1099 D; 793; Tr. 1515-16; 31656-57; 37129; 39012-13; 27071; 38441-43; 24197-200; 37577-78; 32724; 36319; 47020; 39858-59; 46535-36).

The "control clause" was not imposed, promoted or made mandatory by the Code Authority. The only activity of the Code Authority with respect to this clause was its announcement on May 25th 1934 that in its opinion Article IX of the NRA Code permitted any member of the industry to file and bid with such a clause and permitted other members of the industry to use this clause in meeting the competition of the filing parties (Com. Exs. 277 K-M; 840 H-K; Tr. 3702-10; 32724; 33232-34).

36. Exception is taken to the failure to report in Paragraph 132 that the "actual" rate is not the same as the "correct" rate (Tr. 2517; 3706-07; 47790-92; 24196; 2280; 32722-3).

37. Exception is taken to the reference to estimates of the government purchasing department as estimates of the respondents (See Tr. 1279; 1795).

38. Exception is taken to the failure to report in Paragraphs 134 and 201 that most of the respondents discontinued the filing of prices and destination costs prior to the discontinuance of open price filing by the Trade Practice Committee in December, 1935 (Tr. 3128-29; 17004-05; 17065-66; 3692; 4003-06; 5132-34; 8418; 8994-95; 29543; 31744; 33407-08; 33664-65; 37429-30; 34980-81; 25804-05; 35926-27; 36251; 38704-05; 42494; 46949; Com. Exs. 274 F; 547-3W-3Z; 991).

39. Exception is taken to any implication in Paragraphs 134 and 201 that there was some connection between the discontinuance of price filing and the dissemination of land grant information by the Institute, and to the failure to report that the evidence is to the contrary (Tr. 3712; Com. Exs. 591 C; 753 C; 624 D-E).

40. Exception is taken to the failure to report in Paragraph 134 that the Institute land grant service was discontinued in January 1937 (Tr. 4532-33; 16933; Resp. Ex. 169).

41. Exception is taken to the statement in Paragraph 134 that the land grant rate service enabled manufacturers to know what freight factors their competitors were using because there is no evidence to support it. Exception is further taken to the failure to report that the Institute land grant service merely amounted to the reporting by some members of information they had regarding available land grant rates; that such information was re-transmitted by the Institute to its members; that there was no knowledge or assurance on the part of any member which rate would be used in a given case; and that many companies used the lowest rate they knew of regardless of the source from which it came and without any prior notification of the Institute (Tr. 36332-3; 36353-54; 39085-86; 39215-6; 39363-64; 39797; 31843; 31846-47; Com. Exs. 841 i-K).

42. Exception is taken to the terminology "same basis as other rates" in Paragraph 134, in so far as it has any meaning other than that the purpose and effect of the land grant service was to obtain and disseminate accurate land grant rate information in a readily accessible form (Tr. 3712-21; 3811; 16929-33; 17004-05; 31985-87; Com. Exs. 95; 885 2Q-R; 841 i-K).

43. Exception is taken to the failure to report in Paragraph 134 that some respondents did not report land grant rates to the Institute (Tr. 3718; 37128-9; 37449; 47023; 47413-14; 42472; 8650-51; 8455; 42917; 36562; 25430-36; 25480-82; 14080-81; 31986).

44. Exception is taken to the statement in Paragraph 134, that prices were filed with the Trade Practice Committee "under the same conditions" as those obtaining "during the Code period" because it is contrary to the evidence; and to the failure to report the following:

Price filing under the Trade Practice Committee was voluntary. In most cases such filings were not made five days prior to their use. Moreover, many respondents did not file prices (Tr. 17004-05; See also Exception No. 38, *supra*).

45. Exception is taken to the failure to report in connection with Tr. 2202-09 in Paragraph 135 and Tr. 2204-10 in Paragraph 136, that the Scottsboro letting took place during the progress of the hearings in the present proceedings and that the invitation was issued at the request of counsel for the Federal Trade Commission (Tr. 2443-44; 4888-92).

46. Exception is taken to the failure to report in Paragraphs 135 and 136 that several departments of the government favored the use of a "control clause" (Tr. 42269-71; 32721; 21723-29; Resp. Exs. 2995; Com. Exs. 170; 925; 6 F; 3257-59). Other evidence to this effect was stricken or rejected by the Trial Examiner (Resp. Exs. for id: 2922; 3434; 3435).

47. Exception is taken to the inadequate and misleading reference in Paragraph 135 to the evidence regarding f.o.b. mill bidding during the period "prior to the Code" and to the failure to report the following:

Beginning in 1927 the federal government on a few occasions invited bids in the Mississippi Valley region f.o.b. mill without revealing the destination. Respondents in a position to serve that area bid f.o.b. mill on these invitations until it developed that the government was making awards on the basis of its lowest cost at the destination where it was going to use the cement. Eventually one respondent and then gradually others, in addition to bidding f.o.b. mill, bid alternative prices f.o.b. delivered to various points along the Mississippi River where the cement might be used. Upon receiving such alternative bids, the government began to award on the basis of the lowest derived f.o.b. mill prices determined from a consideration of the delivered prices bid. The result was that bidders who quoted flat f.o.b. mill prices in strict accordance with the invitations were unable to receive any awards (Tr. 32676-720; Resp. Exs. 2349-51).

After a few preliminary invitations of this character the federal government began to reveal the destination in its invitations and continued to do so in all but one or two isolated cases until July 1937. In all instances the gov-

ernment received bids from respondents f.o.b. mill (Tr. 39369; 24406; 25899-905; 32671-72; 33224-25; 21616; 8672; Resp. Exs. 841; 844; 851; 854-855; 871-872; 1060; 1062; 1065-1067; 2707; 3397; Com. Exs. 753 G, K-L; 127). One of the instances where the destination was not revealed occurred in 1934 at the request of the Federal Trade Commission (Resp. Exs. 3786 A).

48. Exception is taken to the statement in Paragraph 135 that purchasing agents were unable to obtain f.o.b. mill bids since the beginning of the NRA Code period on the ground that it is based on unsupported conclusions of witnesses and it is contrary to the documentary and other competent evidence (For citations, see Exceptions No. 4, 7-10, *supra;* 51-53, 64, *infra,* all to Paragraphs 130-138).

49. Exception is taken to the failure to report that the Code Authority was never granted the requested audience referred to in Paragraph 136.

50. Exception is taken to the statement in Paragraph 136 that "the industry never conformed". There is no evidence of united or joint action by the industry. Moreover, the evidence shows that most if not all respondents, have sold f.o.b. mill on request (See Exceptions 4, 7-10, *supra,* 51-53, 64, *infra*).

51. Exception is taken to the implication in Paragraph 132 that state governments desired the quotation of f.o.b. mill prices and to the failure to report that most states purchasing cement have invited bids solely f.o.b. destination and that state purchasing agents testified they wanted f.o.b. destination prices. (Tr. 11676-77; 13816; 20221-23; 20233-34; 346; 418; 11799-801; 11904-95; 12158-59; 9307-14; 13760-1; 13768-74; 13782; 13948-54; 27919; 37701; 47902-5; 47959; 24147-49; 27866; 24153; 36283; 35908; 28928-31; 28948; 32418-20; 34429-30; 32796-800; 11630-31; 41710-11; 40059; 27066; 41589-90; Com. Exs. 14; 15; 155; 1212; 1300; 1301; 1847; 1852; 1853; 1854 J-L; 1855; 1881-83; 1916-22; 2443-46; 2448-49; 2450 [E-G; W; 2F; 2 P-Q; 2T; 2Z-3A; 3K; 3 S-T; 4C; 4E; 4o; 4Q; 4U; 4V; 4Z; 5 F-G; 5 R-T; 5Z; 6 C-E; 6G; 6N; 6T; 6V; 6X; 7 C-D; 7 M-N; 7Q; 7U; 7X; 7Z; 8C; 8F; 8H; 8J; 8 L-M; 8 Q-R; 8T; 8 V-X; 9L; 9o; 9Q; 9 U-W; 10-o; 10-U; 10-W; 11 K-L; 11Q; 11 T-U;

11 X-Y; 12 o-P; 13 E-L; 13 R-S; 14o; 14 Q-R; 14 T-U; 14X; 15 C-D; 15M; 15Q]; 2471; 2493; 2495-501; 2503; 2506-07; 2510; 2514; 2521; 2528; 2536; 2556; 2558-60; 2568; 2585; 2590; 2594-95; 3062-92; Resp. Exs. 795; 1049; 1300; 1699-701; 1869; 2333; 2353-55; 2889; 3053-54; 3674-87; 3717.

Further evidence to the same effect was excluded by the Trial Examiner (Tr. 28947-49; 32128-42; 37168-75; Resp. Exs. for id; 2303-04; 3718-19; 3385).

52. Exception is taken to the further failure to report in Paragraph 132 that prior to 1934 two states occasionally invited f.o.b. mill bids for highway construction purposes and on such occasions usually received f.o.b. mill bids from respondents; no awards were made on such bids, however (Tr. 36813; 37701; 37926-27; 40284-90; 40614-15; 12178-83; 9307-08; 11799-801; 11946-52; 25592; Com. Exs. 1863-64; 1875-76; 1884; 1886; 1888; 1890; 1899; 1303; Resp. Exs. 51-60; 1007 R; 1009; 1011; 3178-80; 1010-1020).

53. Exception is taken to the further failure to report in Paragraph 132 that there is no evidence that any state invited f.o.b. mill bids after 1934 (See Tr. 12144-51; 346; 11620; 11682-84; 11736-37; 11796-97; 11824-26; 11838-39; 13781-82; 13760-62; 13797-98; 13935-37; 25882-3; 27018; 30625-26; 36362; 36682; 41939-40; Resp. Exs. 2240 C-G; 3407; see also references to Exception 5, *supra*).

54. Exception is taken to the vague and indefinite reference to the adoption of a "dealer policy" and "dealer plan" and to the failure to specify what "dealer policy" or "dealer plan" is referred to and by what respondents it was adopted. Any inference that all respondents "adopted" an identical policy or that there was "*a*" dealer policy is not supported by the evidence. Exception is further taken to the inferences in Paragraph 137 of collective action by respondents or any of them regarding any of the matters reported therein (See exceptions to Paragraphs 139-146, *infra*).

55. Exception is taken to the characterizations "failed and neglected or refused" to bid direct and to the failure to report the following evidence regarding the W.P.A. (not P.W.A.) jobs to which reference was apparently intended:

The cement dealer serves an important function not only as a retail outlet for the cement manufacturer, but to the consumer. His economic life depended in large part on the sale of cement for the small sized, in-town project with which W.P.A. largely concerned itself. From time immemorial such work had been sold "through the dealer", who was equipped to handle and service it. For the manufacturer to short-cut the dealer by selling this work direct would have been the ruination of the dealer and in turn a severe blow to cement distribution facilities. Great dealer pressure was accordingly brought to bear on NRA to preserve this work for dealers in the NRA Cement Code (See, in detail, with supporting citations *infra*, exceptions to Paragraphs 139-146).

At that time no question of bills of lading was raised or anticipated. That question came up considerably later and there was no direct connection between the two. It arose as follows:

W.P.A. purchasing agents in some sections where land grant rates were available felt they were losing a saving when cement shipments from manufacturers to dealers for resale on W.P.A. work moved on commercial bills of lading at commercial freight rates. In a few instances some of these purchasing agents induced dealers to "swap" the commercial bills of lading for government bills of lading in order to move the goods at land grant rates. This was accomplished by representing that the government owned the goods whereas in fact the cement manufacturer owned them until they arrived at the dealer's warehouse. Opposition registered with W.P.A. headquarters by a railroad which discovered the fraud, resulted in a ruling by the Procurement Division of the Treasury that such practice was fraudulent and could not be continued (Tr. 2437-39; Com. Ex. 374). The government's witness Hayghe, Chief of the Traffic Section of the Procurement Division, testified as follows concerning the discontinuance of the practice (Tr. 2438):

> "Q. Do you remember whether or not the manufacturer said it was illegal and did not want to pursue it any further? A. No.

Q. Why was it discontinued? A. It was discontinued at the instance of the rail carriers.

Q. Do you remember the facts? A. Yes, I do. There were some cases of lumber in the State of Colorado which were the first ones brought to our attention, involving an f.o.b. destination contract, but on which the State Procurement Office issued government bills of lading to cover. The government bill of lading has on it what is termed a certificate of the issuing officer on which there is shown the contract purchase order number and f.o.b. point. These government bills of lading covering the shipments I just referred to—when they arrive in the accounting office of the carriers disclosed the fact that the f.o.b. point was the destination of the shipment. The question was raised by the delivering carrier as to the propriety of according land grant rates with respect to such shipments. We took the matter up and, after considerable research, reached the conclusion that it was an improper procedure and ordered it discontinued."

56. Exception is taken to the inference in Paragraph 137 that the attempted "swapping" of bills of lading by WPA. procurement officers was a general condition and the failure to report that it was only attempted by a few W.P.A. purchasing agents and only affected a few respondents in a comparatively small portion of their business (Tr. 2485-86).

57. Exception is taken to the misleading use of Mr. McQueen's letter to imply that he had reference to the fraudulent "swapping" of bills of lading. Exception is further taken to the erroneous and unsupported implication that the bill of lading question and the policy of most manufacturers of selling W.P.A. work through dealers were one and the same; or that they arose simultaneously; or that there was any dealer association activity involved in the bill of lading question. Exception is further taken to the erroneous and unsupported inference that McQueen's letter was addressed to any respondent or that the evidence shows any collective action by respondents on this subject.

58. Exception is taken to the erroneous and unsupported implication in Paragraph 137 that there was an at-

tempt by any respondent to control or interfere with the freedom of dealers in any respect once they had title and possession of the goods.

59. Exception is taken to the statement in Paragraph 137 that a "large sum" would have been saved if government bills of lading could have been used on the ground that it is not supported by the evidence.

60. Exception is taken to the statement in Paragraph 137 that the "dealer plan" was followed at the expense of loss of business on the ground that there was no "dealer plan" common to all respondents as implied and the statement in its entirety is not supported by the evidence or by the citations furnished (See exceptions to Paragraphs 139-46, *infra*).

61. Exception is taken to the failure to report in Paragraph 137 that the good will of dealers is a factor of paramount importance to each manufacturer and that he must consider and respond to that factor constantly, in judging how best to increase his total volume even though it may result in the loss of a given sale (See exceptions to Paragraphs 7-81, *supra;* 139-146, *infra*).

62. Exception is taken to the statement in Paragraph 137 regarding the respective influence of thirty thousand dealers and "ninety" manufacturers on the ground that there is no evidence to support it. Exception is further taken to the failure to report that the greater number of dealers was shown by the evidence to have brought about suspension of Article XI of the Code by executive order of the National Recovery Administration. Except for the formulation of NRA Code provisions the influence of dealers affected, and was met by individual manufacturers in accordance with the conditions in their respective trade areas, and no collective action was taken by the respondents (See exceptions to Paragraphs 7-81, *supra;* 139-146, *infra*).

63. Exception is taken to the statements in Paragraph 138 implying that there is an "industry policy" regarding f.o.b. mill sales on all the grounds heretofore stated.

64. Exception is taken to the failure to report in Paragraph 138 that many respondents in many areas have

quoted f.o.b. mill prices which were not "derived" f.o.b. mill prices (Tr. 1758-59; 3533-36; 11422-23; 11365-66; 3817-18; 17000-01; 17099-109; 42469; 42592-98; 42611-12; 42644-52; 41872-73; 1704-06; 1742-4; 251-53; 307; 312-13; 39012; 39014-15; 9027-32; Com. Exs. 114; 118; 120; 127; 129; 135; 769; 771-72; 783; 785; 786; 788; 796; 3261; Resp. Exs. 292; 295-96; 302; 340; 344; 1060; 1064-66; 2192 D; 2350; 3782).

65. Exception is taken to the inference in the term "contra" in citations to Paragraph 138 that the weight of the evidence supports the remaining propositions set forth therein. This is not supported by the evidence.

"Dealer Definition and Policy"

Paragraphs 139-146

1. Exception is taken to the failure to report that the individual practices of each respondent relating to distribution through dealers and direct sales are the result of an orderly evolution unaccompanied by any agreement and to the failure to report further on the producer-dealer relationship as follows:

2. In the nineteenth century domestic cement producers sold their cement f.o.b. mill to cement distributors, who in turn sold the cement at wholesale either to building material dealers or to consumers (Tr. 23044-45; 26005-06; 26020; 26412; 26562; 26618-27; 32652-53; 23044-46; 33215-17; 10540-42; 10571-73; Com. Ex. 2878 D; Resp. Ex. 3788). New companies entering the cement business around 1900 began to sell direct to dealers and consumers, eliminating the distributors (Tr. 26618-30; 27189; 23045-48; 26627; 32652-53). By 1912 practically all cement manufacturers were acting as their own distributors (Tr. 35875-79; 23044-45; 26629; 26422; 32658-59; 38607-09). For example by 1902 Alpha had stopped doing business through distributors (Tr. 23044-45). By 1907-08 Lehigh did so in the Midwest (Tr. 26629). In 1910-12 all Lehigh Valley mills had done so (Tr. 35878-79) and in 1912 Lehigh had done so everywhere (Tr. 27190; 26629).

3. For well over thirty years the greater proportion of the retail sales of cement had been handled by building ma-

terial dealers (Tr. 23557-60; 26022; 26685-86; 26629-30; 26686-87; 23635-36; 35074-75; 25895; 35916; 12049-50; 12962-63; Resp. Exs. 1091; 3067; 2473; 2632; 2795; 1084; 2757 A; 2566; 2567; 2409; 1616; 1632; 3423; 1638).

The percentage of business sold through dealers is indicated as follows:

Company	*Year*	*Percentage*	*Reference*
Dewey	1912	largely	Tr. 47076
Alpha	Prior to 1915	90%	Tr. 23557-59
Marquette	1924-1940	Main outlet	Tr. 39038-39
Alpha	Prior to 1927	85-90%	Tr. 23584
Alpha	Up to 1929	90%	Tr. 23606-07
Alpha	1929-37	Less than 90%	Tr. 23635-36
Nazareth	1924	79-80%	Tr. 28343
Alpha	1933	80%	Tr. 25883-84
Alpha	Past 3 years	75-80%	Tr. 24721
Whitehall	1935	81%	Tr. 28567
Edison	1930-1940	80%	Tr. 35767
Hermitage	1930-1940	75%	Tr. 36208-09
Monarch	1930-1940	over 72%	Tr. 42193-94
North American	1926-1933	84%	Tr. 33896

The percentage of business sold through dealers at the present time is as follows:

Company	*Percentage*	*Reference*
Green Bag of W. Va.	100%	Tr. 29530
Alpha	80-85%	Tr. 25883-84
Petoskey	80-85%	Tr. 38754
Southwestern (Tex.)	81%	Tr. 38953-54
Southwestern (O.)	80%	Tr. 29108-09
Kosmos	80%	Tr. 36818
Medusa	80%	Tr. 40068
Missouri	80%	Tr. 37134
Southern States	80%	Tr. 37539-40
Lone Star	60-90%	Tr. 32774
Hermitage	75%	Tr. 36208-09
Ash Grove	over 66%	Tr. 13732
Northwestern States	over 65%	Tr. 36485
Pittsburgh Plate Glass	65%	Tr. 37707
Marquette	over 60%	Tr. 39971-72
West Penn	60%	Tr. 27752 (See 27915)
Peerless	over 50%	Tr. 34376
Universal Atlas	over 50%	Tr. 35074-75 Resp. Ex. 2473

Company	*Percentage*	*Reference*
Southwestern (O.)	Practically all	Tr. 29073
Bessemer	Majority	Tr. 32186
Cumberland	Backbone	Tr. 39857
Hercules	Larger part	Tr. 10544
Keystone	Substantial	Tr. 27485
Lehigh	Larger proportion	Tr. 12962-63
Louisville	Big part	Tr. 13280-81
National	Most important	Tr. 39533
Superior	Greater part	Tr. 29598
Whitehall	Principal outlet	Tr. 28558

4. Cement dealers are located throughout the entire country. There is one or more dealers in practically every city, town and village throughout the country (Tr. 23601). For many years the overwhelming proportion of dealers have bought cement from more than the manufacturer; and usually from several (Tr. 23306-07; 28575; 27633; 27714; 28022; 32182; Resp. Ex. 2588; Tr. 36218; 36962; 37217; 39547; 18826-27). Originally there were a large number of exclusive dealers, now there are very few (Tr. 23306-07; 23627; 27632; 30684-85; 34354; 42194. There is no general practice concerning the number of dealers in any one town to whom a manufacturer will sell cement (Tr. 36485; 26064-65; 36216-18; 30684-85).

5. A dealer performs all the necessary functions in the retail marketing of cement (Resp. Exs. 21; 2567; 2566; Tr. 23605-07; 24718-20; 26751-52; 26026-27; 27485; 28573-74; 27753; 30671-72; 32187-89; 36747; 38641; 38953-55; 39038-39; 39533; 41497-99: 41629; 41962-63; 42193-94; 12050; 13732). These services include carrying warehouse stocks in local communities, selling in less than carload lots, soliciting business from small customers, supplying technical assistance to contractors in connection with construction work, and carrying the credit risks of such accounts (Resp. Exs. 21; 2567; 2566; 678; Tr. 23555; 23605-06; 26022; 26026-27; 27485-89; 28573-74; 29598; 29650; 27753; 41499; 12047-48). Further proof offered by respondents on this subject was rejected or curtailed by the Examiner (Tr. 26023; 32187-90).

6. Dealers are indispensible to any manufacturer's distribution system and the evidence shows that dealers

can distribute the product on many types of business much more cheaply than could be done directly by a manufacturer (Tr. 29073; 38955-56; 41499-500; 41629; 42193-94; 12041; 13732; 30672; 32169-70; 33894-97; Com. Ex. 1174). Proof offered by respondents on this subject was curtailed (Tr. 26053).

7. Dealers are a highly satisfactory outlet of the cement manufacturer for a number of reasons. To the extent permitted by the Examiner it was shown that: They usually purchase from the same source or sources of supply; they purchase steadily over a period of years; they usually have high credit standing; their business involves no special expenses; and they promote the sale of cement (Resp. Ex. 21; Tr. 26751-52; 27714; 36747; 37543-44; 39038-39; 39857; 41629). Further evidence was rejected or stricken by the Examiner (Tr. 37845-46; 38955-56). Contractor sales are often less desirable than dealer sales: Contractors often are less reliable from a credit point of view, and there is little assurance of a repeat business from a contractor (Tr. 39533-34).

8. It was not until 1910 that the federal government began buying cement in any quantity (Tr. 23632-34; 47077-78). Often sales to federal and state governments have not been attractive: They often require specially tested cement which must be stored at additional expense; governmental agencies usually take the benefit of the cash discount regardless of whether or not they are entitled to it, and there are often delays over a considerable period of time before payment is received; government contracts are often little more than options to purchase, so that after receiving a large award, a company is not sure that its shipments on that contract will be correspondingly large but in any event to protect its performance bond must assume the cost of being prepared to ship (Tr. 26152; 24034-38; 27560-64; 27743-44; 27920-21; 28053-56; 28323-26; 28608-17; 28661-63; 28669-70; 28956-62; 29516-18; 29596-98; 30596-99; 30623-25; 31195-99; 32055-60; 32150-51; 30606-08; 32322-23; 32739; 34238-44; 35912-13; 35981; 37128; 37278; 37576-77; 37702; 38148-49; 38731-32; 38750; 39008-09; 39533-34; 39863-64; 40059-600; 42097; 42192-94; 34231-32; 42192-93;

34241; Resp. Exs. 1091; 2473; 2757 A). Additional evidence to the same effect was not received (Resp. Exs. for id.: 2999 A-B; 2987 A-Z24. Many respondents have sold very little cement to federal or state agencies (Resp. Exs. 2632; 1091; 2757; 2473; Tr. 30597). For example: West Penn, 3% (Tr. 27752); Peerless, 5000 bbls. (Tr. 34489); Monarch, 2% (Tr. 42192-93); Nazareth, 5%, Southwestern (Ohio), small (Tr. 28956); Green Bag, W. Va., none (Tr. 29409-12); Lawrence, 1% (Tr. 31195); Missouri, none (Tr. 37276-77).

9. Government jobs require as much or more service and sales expense as commercial jobs. Manufacturers prefer to sell to dealers. Government business is not repeat business (Tr. 32331-33; 11364; 30606-08; 28956-59; 37278; 30624-25; 37576-77). Proof offered by respondents on this subject was curtailed (Tr. 39010-11).

10. Dealers have always wanted all cement distributed through them (Tr. 38903; Com. Exs. 458 A-C; 547 B; 867-7E; Tr. 23594; 25949; 34494; 37410-13; 38902-03; 12063-64; 12073; 28462-63; 12963-64; Resp. Exs. 1500 A-B; 797 A-B; 798). As time went on, most dealers became reconciled to sales by manufacturers directly to the United States and state governments but they have strenuously objected to the extension of direct sales of cement to government agencies for small local jobs of construction and repair (Com. Exs. 458 A-C). Proof offered by respondents on this subject was curtailed (Tr. 38903).

11. A cement manufacturer gives serious consideration to the requests and demands of his dealers, because dealers are generally his most important distribution outlets (Resp. Exs. 2176 A-B; 3112 A-C for id.; 675; 3629 A-B; 3632; 798; 799 A-B; 800; Com. Exs. 547 A; 1174 o; Tr. 23605-07; 26384-85; 28467; 32583-87; 32774; 35755-56; 35765-66; 26751; 36818; 37707; 38754; 38954-55; 39857; 26687). Manufacturers have attempted to cultivate and to preserve good will of their dealers (Com. Exs. 304 A; Tr. 26687; 26698-99; 26751-52; 35916; 36215-18; 36818; 37707; 38754; 39857; 13733-34). [Cement manufacturers perform many services for dealers (Tr. 33950-52; 35727-30)]. There are only a limited number of competent dealers in a market solicited

by many competitors, so each manufacturer is careful not to lose a dealer connection if possible (Tr. 6652-53; 26698-99; Com. Ex. 304 A). As a result, customers, and especially dealers, profoundly influence the selling and marketing policies of manufacturers (Tr. 29125; 26687). At times a given manufacturer has found that it was not in its individual self-interest to sell as much cement direct to consumers as possible, but rather to go along with its dealers' wishes (Tr. 28459).

12. In taking over the function of distributor some companies merely sold to those same persons who had been buying cement from their distributor (Tr. 26020). In other cases the distributors became dealers (Tr. 35878-79; 38608-09).

13. Cement manufacturers have always been interested in developing a large number of purchasers who would take care of retail sales of cement, would promote the use of cement in their neighborhood and were reliable businessmen; such persons have been considered dealers (Tr. 39857-58; 42196). As a matter of individual business policy the principal requisites of a dealer have always been:

One to whom purchasers would look for a supply of cement (*i. e.*, one who stocked cement for resale), and whose credit standing was good (Tr. 36204-05; 36230-31; 36818-19; 37528; 37707; 38640-41; 38754-55; 38960; 40067-68; 36779; 41503-04); and most companies individually investigate the qualifications of prospective dealers (Tr. 30148-49; 30162-63; Resp. Exs. 2038; 2039; 2042; 2043; 2040; 2041; 2044; 2036; 2037; 2045; 2046; Tr. 46901; 30685-86; 41630-31; 26063-64; 26055-58; 26432-34; Resp. Exs. 2675; 2676; Tr. 36202-04; 36231-33; 27490; 36818-19; 36962; Resp. Ex. 1112; Tr. 40067; 36483; 36485; Resp. Exs. 2448 A-C; 2445 A-B; 2447 A-B; 2446 A-B; 2443 A-C; 2444 A-B; 2442 A-E; Tr. 34349-50; 34504-05; 38754-55; 37707; 29070-71; 38960-61; 27908-09; 35916; 28555). Respondents are not influenced in determining who is a dealer by the fact that competitors do not sell cement to him as a dealer (Tr. 23625-27; 39857-58; 46900; 30672-74; 41630; 26062; 36205-06; 27490-91; 6491; 37215-16; 39551-52; 36484; 34354-55; 28556-57).

Almost every manufacturer testified that his concept of who constituted a dealer has been the same since he entered the business, and most of them referred to the NRA Cement Code definition (See Com. Ex. 557) as a good restatement; *Keystone* (1905) Tr. 27490; *Whitehall* (1919) Tr. 28553; *Lone Star* (1910) Tr. 32828; *Alpha* (1903) Tr. 23625; *Hermitage*, Tr. 36202; *Northwestern States*, Tr. 36483-84; *Kosmos* (1906) Tr. 36819; *Pittsburgh Pl. Glass* (1925) Tr. 37708; *Petoskey* (1920) Tr. 38755; *Southwestern* (1920) Tr. 38960-61; *Medusa* (1910) Tr. 40067; *South Dakota*, Tr. 41500-03; *Hawkeye*, Tr. 41631; *Dewey* (1912) Tr. 46899; see also Tr. 27753-54; 28553; 29528-29; 29598; 32828-29).

14. The use of a definition of a dealer by individual manufacturers goes back many years (Tr. 23620-21; 23565; 23621-25). Alpha adopted a definition of a dealer in 1903 (Tr. 23620-21; 23570; 24711; Resp. Ex. 673 C). The witness Coogan testified "there has been practically little or no change" in Alpha's definition since that time and in fact it was like the NRA Cement Code definition (Tr. 23625). Since 1903 Alpha has sold cement to anyone as a dealer who normally handled building materials in a given community and to whom purchasers would likely resort (Tr. 23625).

15. The Code of Ethics of The Cement Institute did not contain a definition of a dealer (Com. Exs. 138 A-T).

16. In 1933, the NRA Cement Code contained a definition of a dealer in Article XI (Com. Ex. 557) [Com. Ex. 556, a draft of the Code, had a different definition, and Com. Ex. 637 E, an earlier draft of the Code (6/22/33) had a still different definition]. The only evidence on the subject shows that the code definition did not affect the practices of any company: *Whitehall* (Tr. 28553-54); *Alpha* (Tr. 23625); *Hermitage* (Tr. 36202); *Northwestern States* (Tr. 36483-84); *Kosmos* (Tr. 36819); *Pittsburgh Pl. Glass* (Tr. 37708); *Petoskey* (Tr. 38755); *Southwestern* (Tr. 38960-61); *Medusa* (Tr. 40067); *South Dakota* (Tr. 41500-03); *Hawkeye* (Tr. 41631); *Dewey* (Tr. 46899). See also Tr. 27753-54; 28553; 29598; 30149; 32828-29; and exceptions to Paragraphs 7-81, *supra*).

17. The dealer definition was one of the portions of Article XI which was suspended by the NRA Administrator in January, 1934 (Resp. Exs. 3183 T, F, J; 2712 B). The Cement Code Authority took the position, after the suspension of Article XI, that it was not interested in who was a dealer (Resp. Ex. 181). No definition of a dealer was contained in the second NRA Cement Code, as approved in May, 1935 (Com. Ex. 560). Dealers and Dealer Associations proposed definitions during the period from January, 1934 to April, 1935, while the second Cement Code was in process of preparation (Resp. Ex. 690). From January, 1934, until Lehigh made its announcement to the trade in April, 1935, no respondent announced, or published a definition of a dealer to its trade. Lehigh's announcement of April 6, 1935, contained a definition which followed the NRA Code definition of a dealer (Resp. Ex. 1613 B; Tr. 26757). This is the only definition Lehigh ever issued (Tr. 26753-57). Similar announcements were made by some other cement companies at later dates but some respondents did not include a definition of a dealer in their policy announcements of April, 1935. For example: *Arkansas* (Com. Ex. 873 i); *Pittsburgh Plate Glass* (Com. Ex. 1934); *Dewey* (Com. Ex. 2386); *Oklahoma* (Resp. Ex. 3581).

18. The evidence shows that six respondents (*Whitehall, Green Bag, W. Va., Aetna, Bessemer,* and *Southern States*) have never published or had a formal definition of a dealer (except when Article XI was in effect) (Tr. 28553; 29531; 30149; 32180-81; 37528). There is no evidence that the following respondents issued any announcements in April, 1935 or ever issued any definition of dealer: *Arkansas, Ash Grove, Bessemer, Colorado, Coplay, Cumberland, Dewey, Georgia, Giant, Glens Falls, Great Lakes, Green Bag of W. Va., Green Bag of Pa., Hawkeye, Huron, Idaho, Keystone, Marquette, Missouri, Monolith Midwest, North American, Oklahoma, Peerless, Petoskey, Pittsburgh Plate Glass, Utah, Signal Mountain, Southern States, Standard, Superior; Inc., Three Forks, Valley Forge, Vulcanite, West Penn, Whitehall* and others.

19. The Compendium of Established Terms and Marketing Methods did not contain a definition of a cement dealer (Com. Ex. 561),

20. After the enactment of the Walsh-Healy Act (6/30/36) departments of the federal government customarily included a definition of a dealer in their invitations to bid (Com. Exs. 176 C; 122; 3261; Resp. Exs. 292; 296; 297; 344; 345; 350; 777; 894; 2285; 2307; 2998; 3048; 3051; Tr. 39169-70). This government definition was similar to the definition announced by Lehigh in April, 1935 (Com. Exs. 2262 B; 122).

21. Although over the period of years from 1903 to 1935 what constituted a cement dealer came more or less to be defined in the same words by many manufacturers (Tr. 29528-29; 41628-29; 32828; 41588-89; 29598; 27753-54; 28553), the respective respondents who had such definitions greatly varied their individual interpretation of them (Tr. 6656-58; 23627; 30149; 32180-84; 32186; 30671-74; 41629-30; 36202; 36414-15; 36819; 36961-62; 32829; 32834; 32840; 40067-68; 37213-16; 28347-48; 41963-64; 36483; 34353-54; 34506-07; 37707-08; 29071-73; 27754; 35916-17; 39857-58; 38719; 26062; 38719; 38960-61; Resp. Exs. 2677; 1871; Tr. 27491; 28554-55; 32182; 36962; 37215). Further proof was curtailed by the Examiner (Tr. 32836-37). Often individual manufacturers found competitors selling to persons whom they did not consider to be dealers. Some respondents have never had any rule or definition regarding their dealers *Hawkeye* (Tr. 41629-30); *Hercules* (Tr. 26426-27); *Kosmos* (Tr. 36819); *Missouri* (Tr. 37215); *Monarch* (Tr. 42196; 42332-33; 42414); *Nazareth* (Tr. 28347-48); *Nebraska* (Tr. 41963); *Southern States* (Tr. 37528); *Southwestern* (Tex.) (Tr. 38960-61); *Volunteer* (Tr. 38640-41).

22. There is abundant evidence showing that there has been no agreement as to who constitutes a dealer (Tr. 32182-85; 42674-80; 42788; 39858; 46902; 35723-24; 30672-74; 29530; 36208; 36231-32; 27490-91; 36961; 32829-30; 32833; 32841; 33243-44; 6655-56; 34560; 37215-16; 48110; 42332; 41963-64; 36484-85; 48102-03; 34355; 38719; 39304; 29601; 38640; 27898-99; 27901-03; 28555; 35992; 26517; 27898-99; 27901-03; 32841).

23. Neither the Institute nor dealer associations ever designated who was or was not a dealer or promulgated any definition of a dealer (Tr. 42447-48; 48101; 37217; 48103-04; 29530; 26062-63; 26426-27; 36333-34; 36231-32; 27492; 36961; 32829-30; 32833; 32841; 33243; 6655-56; 39038; 37220-21; 37217; 37215-16; 41963-64; 36484-85; 48102-03; 34355; 38719; 42878; 47667; 39304-05; 48105-06; 37215-17; 29601; 48105; 48106-07; 27898-99; 27901-03; 28558; 28555; 36026; 35992).

24. Exception is taken to the failure to report the evidence showing the following regarding the facts and circumstances surrounding the various classifications of business and of customers which were created or adopted by individual respondents.

25. Sales by producers direct to certain classes of customers developed with increasing uses for the product and the consequent influx of new classes of users, such as concrete block manufacturers, cement products manufacturers, ready mix plants, etc. When one producer began to sell a type of business or customer direct, not only was the cement dealer unable to compete with him, but other producers routing such business through their dealers, were likewise unable to compete. The result was that competitors had to sell direct also, except in the unusual case where they were able to maintain or increase their volume of business by reason of increased patronage on the part of dealers disapproving the change (Tr. 23638; 28465; 36968; 32408-10; 39663; 36538-39; 35843-44). Accordingly, each manufacturer found an increasing necessity to indicate clearly to its trade the conditions under which it would sell direct and some manufacturers issued individual announcements to the dealer trade doing so (Tr. 41506-07; 28248; 26742).

The trend over the past forty years has been to make more and more direct sales and this trend has resulted in reducing the cost of cement to the ultimate consumer since it eliminates one handling of the cement and the dealer mark-up.

26. The NRA Cement Code approved by the President contained a classification of business (Com. Ex. 557). Many influential dealers protested this provision on the

ground that it provided for direct sale on too large a proportion of cement sales and because of their influence this Article was later suspended by the NRA Administrator [They did not object to the definition of a dealer contained in the article] (Resp. Exs. 183 C; 178 A-B; 1608 A-B; 3183 F; Tr. 86-88; 26738; 28275-76; 23599; 28462-63; 6921-22; 4264; 4288-89; 17022-26; 29205-06; Resp. Exs. 1510 A-B; 1518 A; 1524 A-B; 1526 A-B; 1527 A-B; 1528 A-B; 1529 A-B; 1531; 1534; 1535; 1536; 1537; 1539 A-B; 1540 A-B; 1543 A-B; 1544 A-B; 1547; 1548; 1549; 1550; 1551; 3643 M; 1496 A-B; 1502; 1503; 1506 A-B; 1519 A; 1525 A, B; 1530 A, B; 1532; 1533; 1536; 1496 A-B; 1545 A-B; 1552 A-B; 1493 A-B; 1501 A-B; 1509 A-B; 1511 A-B; 1521 A-B; 1522 A-B; 1538 A-B; 1542 A-B; 1546 A-B; 3643 D; 3643 E; 3643 G; 1492; 1494 A-B; 1495 A-B; 1517 A-B; 1520 A-B; 1523 A-B; 3643 B; 3643 F; 3643 H; 3643 i-J; 3643 P; 1505 A-B; 1515 A-B; 1516 A-B; 3643 K; 3643 N; 1500 A-B; 1498 A-B; 1499 A-B; 1504 A-B; 1541 A-B; 2457 B-C; 3643 L; 1497 A-B; 1507 A-B; 3643 C; Com. Ex. 611 E; Resp. Exs. 1513 A-B; Com. Exs. 879 A-B; Resp. Exs. 1514 A-B; 1512; 1508 A-B; Tr. 28462-63; Resp. Exs. 1536; 1540; 1506; 1539; 1521; 1520; 1554; 3643 A, N, o; 2457 A; Tr. 28283; 23594; 17025-26; Com. Exs. 645 H-M; Tr. 17022-23; Com. Ex. 617 E; Tr. 17022-23; Resp. Exs. 2712 B; 3183 F, J; Tr. 4288-89; 4264-67).

27. The NRA then instructed the Cement Code Authority to cooperate with the Dealer Code Authority in drafting a substitute provision but no new classification was ever approved (Resp. Exs. 1553 A-B; 3183 F, G, K, L; 2712 B; 2455; Tr. 29205-26; 24962).

The evidence shows that respondents had no agreement to follow Article XI after its suspension (Tr. 201-08; 39857; 30686-87; 35917; 36201-02; 36523; 37270-71; 39553-54; 46539; 47094).

28. After the suspension of Article XI, dealer pressure continued, both with reference to a classification of business and the definition of a dealer (Resp. Ex. 690; Tr. 36965-66; 38714). As a result of this pressure, the Lehigh Portland Cement Company announced a sales policy first

in February, 1935 and then in April, 1935. The latter included a definition of a dealer.

29. The evidence shows that there was no consultation or agreement between Lehigh and any of its competitors concerning its February 1935 policy (Tr. 26740-43; 27234-35; Resp. Ex. 3580 B; Tr. 23597; 36246-47; Resp. Ex. 1490; Tr. 28266; 28468; 28252-57; 28262-68; 36529-30; Resp. Ex. 3641 A; Tr. 36964; 30814-17; 30850-52; 30691-92; 37271-72; 29082-85; 29088-89; Resp. Exs. 1745-56; Tr. 34493; 35088-89; 37940-41; 39554; 40065-66; 42072-73; 47084; 7081-82). Lehigh's competitors learned of these announcements and obtained copies from their dealers who pressed them for similar announcements (Resp. Exs. 1746-56; Tr. 29085; 29088; 28251; 30850-52; 36246-47). Many companies did issue similar announcements thereafter but there was no agreement to do so either with dealers or manufacturers (Tr. 36820; 30695; 30687; 36965-66; 40065-67; 34392; 37941; 29094-95; 35917).

30. After Lehigh issued its April 1935 policy competing manufacturers again learned of it from their dealers (Tr. 30701; 30851; 36964; 30816-17; 36965-66; 40065-66; 37941; 23607-08; 30692; 28311-13; 29098; 38980; 36530-31; 47088; 7360). The dealers in turn requested that they adopt a sales policy similar to Lehigh's or at least announce some statement of policy (Tr. 36965-66; 30695). As a result, a number of companies (including Castalia) individually adopted and broadcast to the trade a sales policy, including a definition of a dealer, similar to the Lehigh policy (Tr. 30695; 36965-66; Com. Ex. 1935; see also exceptions to Paragraphs 7-81, *supra*).

31. Exception is taken to the statements that these policies prevail generally in the trade in the Middle West and in all territories east of the Mississippi River. No such policies were issued on the Pacific Coast or in Texas. Many other respondents did not issue policies either in April, 1935, or in the form similar to the Lehigh announcement of April 6, 1935 (Tr. 28576; 30163-64; 32190-91; see exceptions to Paragraphs 7-81, *supra*). The February Lone Star policy was different from Lehigh or Castalia

in its classification of business and it did not contain a definition of a dealer (Com. Exs. 1165 i-J).

32. Exception is taken to the failure to report the abundant evidence showing that respondents have had no agreement or understanding regarding direct and dealer sales or customers (Tr. 24734; 24748-49; 23613; 46641; 12685; 47085; 47090-91; 47100-01; 35843-44; 30701-02; 48101-03; 48105-06; 48106-07; 37606-07; 29535; 26068; 36335; 27493; 36820; 34560; 34573; 39036; 40066-67; 37270; 37272; 39556; 42072-73; 42076-77; 28235; 28245; 36520; 34392; 38718; 37708; 37941-42; 12770-71; 37606; 29103; 29095; 29382-83; 29601; 38903-04; 38956-58; 38981; 39416-18; 33009-10; 38648-49; 35917) and that The Cement Institute has not interpreted or controlled in any way the marketing policies of the respective respondents (Tr. 46900; 41630-31; 36333-34; 48101; 48103-04; 48105-06; 48106-07; 26136-37; 39038; 37217; 37220-22; 36026; 16934; 4261-62; 4297-98; Com. Exs. 202-2B-2C); see also exceptions to Paragraphs 7-81, *supra*).

33. Exception is further taken to the failure to report the following in Paragraph 139:

The Trade Relations Committee of the American Association of Portland Cement Manufacturers (a non-respondent) did in 1912 collect information concerning the practices of its members (many of whom are not respondents) concerning who constituted a dealer (Tr. 24710-11). There was no understanding or agreement among respondents to abide by the report of this Committee (Tr. 24710-11) and the definition of a dealer published by it in 1912 was never followed by the members of the A.A.P.C.M. (Tr. 24711; Resp. Ex. 3788 answers to question No. 28 beginning on p. 1508).

34. Exception is taken to the failure to report that the first paragraph of Com. Ex. 873 C quoted in Paragraph 139 refers to the efforts by the dealers' Code Authority and the cement manufacturers' Code Authority to arrive at a revision of Article XI and to secure the approval of the NRA Administrator of such a revision, all pursuant to instructions from NRA.

35. Exception is taken to the assertion in Paragraph 141 that Scovel worked out an interpretation of Com. Ex. 1935, which is a Castalia policy announcement. This is not supported by the evidence. Exception is taken to the failure to report the following:

Scovel, an employee of Universal-Atlas, prepared an interpretation of Universal Atlas' policy of April 9, 1935 (Resp. Ex. 1760). Its purpose was to put down in a handy form Universal's practices under its April 9, 1935 sales policy (Tr. 13181). It was prepared by Scovel from his knowledge of the business practices employed by Universal-Atlas over a period of years (Tr. 13129-32) and from suggestions of other Universal-Atlas employees (Tr. 13176). Scovel did not attend any meeting of dealers or manufacturers at which this interpretation was discussed (Tr. 13180). Evidence on behalf of other respondents shows they did not attend any such meetings (Tr. 12628-29; 13180-81). Scovel's interpretation of his company policy was not distributed to the dealer trade, to competitors, the Cement Code Authority or Trade Practice Committee of the Institute (Tr. 13181). It was for the use of the Universal-Atlas sales force and was used by them (Tr. 13129-32; 13174-75; 13127-28).

Scovel's interpretation did not originate any new marketing practices by Universal-Atlas, but was merely a statement in detail of its practices which were either in effect at that time or which had originated earlier and which, for the most part, had been followed by the company for many years (Tr. 35363-85). A witness from the sales department of the Universal-Atlas Company testified in detail as to the origin of the practices touched upon in it (Tr. 35363-85).

There was no obligation on the part of Universal-Atlas to adhere to its sales policies of February and April, 1935, or to the practices set forth in its inter-office interpretation (Tr. 35387-88). Witnesses on behalf of the company denied that there was any agreement or understanding between Universal-Atlas and any of its competitors, or with anyone else, to follow this interpretation (Tr. 35387-88). From time to time after Scovel prepared this interpretation in May, 1935, Universal-Atlas made variations in its practices

(Tr. 35388-90). These variations were testified to by a representative of Universal-Atlas (Tr. 35388-90). There is no evidence of any general distribution or use of this interpretation. Many companies showed that they knew nothing about this interpretation (Tr. 30817-19; 24431-32; 25402; 25945-47; 12741-42; 13062). Many others never issued or used such a document (Tr. 24429-35; 24437; 25945-47; 12729-30; 39755-56; 27007; 30817-19; 12630-31; 12728-29; 12737):

36. Exception is taken to the failure adequately to report the evidence regarding Com. Exs. 547-4B-4i and to the failure particularly to refer to the following:

The evidence shows that no agreement or understanding occurred either at the meeting of the Sixth District of Institute or afterward concerning classification of business or otherwise (Tr. 36259; 36411-13; 32973; 25401-02; 37546; 36255-56).

37. Exception is taken for failure to report in Paragraph 143 that McQueen was the secretary of the Dealer Code Authority and of the National Federation of Builders Supply Associations and he has never been affiliated with any cement company (Resp. Exs. 3183-Z2; Tr. 13499; 4329-30). The activity of the dealers was independent of any acts of manufacturers. There was no showing that cement manufacturers were ever supplied with or made use of such lists of dealers.

38. Exception is taken to the implication that "lists were required to be furnished" when from the context it shows that merely a strong hope was expressed that such lists be furnished, and when there is no showing that all or any appreciable number of the respondents ever were furnished with such lists.

39. Exception is taken to the statement that Com. Ex. 2305 is a list, etc., since this is not correct, the document is a price quotation issued by Alpha and not a list of dealers.

40. Exception is taken to the failure to report in Paragraph 144 that the activities mentioned were the individual

activities of the respective cement manufacturers; and that no steps were taken by respondent cement manufacturers or The Cement Institute to compel the observance or to enforce classifications of business or dealer definitions (Tr. 16934; 4261-62; 4297-98; 37222; Com. Exs. 202-2B-2C). Lone Star and International referred to in Paragraph 144 are the same company. The activity of the dealers in Bridgeport in 1929 is not connected with any cement manufacturers and precedes the organization of the Institute (Com. Exs. 136 A-F).

41. Exception is further taken to the failure to report regarding Hermitage that it has had a policy of not shipping cement to one dealer for sale in the territory of another Hermitage dealer for many years (Tr. 36214-15; Resp. Exs. 2679-86; 2662-63; 2691). Hermitage independently adopted a "no diversion stamp" as part of this policy (Tr. 36232-37; Resp. Exs. 2696-97). The evidence shows that Hermitage never had any agreement or understanding to adopt any of these policies (Tr. 36250; 36214-15).

42. Exception is taken to the erroneous implication that Com. Ex. 1158 A contains some reference to "recognized dealers".

43. Exception is taken to the unsupported inference that the acts described in Paragraph 144 were carried on pursuant to or as the result of an understanding or agreement.

44. Exception is taken to the failure to report the following in Paragraph 145:

Sales to dealers represent more than 60 per cent of West Penn sales and a large percentage of its dealer business consists of repeat orders (Tr. 27752-53; 27714). West Penn's concept of a dealer varies to suit the needs of the community (Tr. 27754) but generally the company considers anyone a dealer who has warehouse facilities, delivery equipment and salesmen to solicit business and who carries a sufficient stock of cement so as to serve the needs of the community (Tr. 27753-54). West Penn has written to dealer associations requesting information about dealers

in order that it could select dealers carefully by getting all possible information (Tr. 27756-57). The evidence shows that words "recognized dealer" used in this connection were used to ascertain if the consuming public consider a person to be a dealer (Tr. 27758-59); it further shows that West Penn has been free to sell to anyone as a dealer (Tr. 27759-60). Every exhibit cited in Paragraph 145 of the Report was explained by a witness of West Penn who denied that the company had any agreement to restrict sales to a limited class of "recognized dealers" (Tr. 27752-89). West Penn never had any conferences with competitors on dealer policies (Tr. 27898-99). It determines its own dealer policy independently of competitors, dealers or dealer associations (Tr. 27899-900) and has never refused to sell to a dealer to whom it previously sold cement because of a complaint by a dealer organization (Tr. 27908).

45. Exception is taken to the failure to report that the action of West Penn in seeking information from dealer associations is not typical of other respondent's action; and that the evidence shows that respondents generally have never asked dealer associations for lists of dealers or whether a particular person was a dealer (Tr. 26434; 32840). There is no evidence that any company refused to sell or discontinued to sell to any person because he was not recognized by dealer associations (Tr. 24711-12; 36484; 48101; 48103; 48105; 48105-06; 48106-07). Most companies pay no attention to complaints or requests by such associations (Tr. 28557-58; 30672-75; 32839-40; 33243; 6483; 6659; 36204-05; 36223-24; 36230-31; 37216-17; 37529; 37935; 38640; 38719; 39548; 39551; 39857-58; 41506-07; 41631; 42332; 42414; 46900).

46. Exception is taken to the failure to report the following in Paragraph 146:

The evidence shows that Alpha has had no agreement with competitors or dealers regarding a dealer definition or classification of business (Tr. 23638-39; 23339-41; 23843-44; 23872). All of the acts described in Paragraph 146 were carried on individually by Alpha and its dealers or their representatives (Tr. 23638-39). Alpha announced

to the trade on April 8, 1935 that it would make sales direct to "*large* manufacturers of concrete and cement products" (Resp. Ex. 685; Tr. 23608). The letter to Indiana Lumber and Builders Supply Association was in accord with its announced policy and was the individual action of Alpha (Resp. Ex. 685; Tr. 23608). Com. Exs. 867-7B, 6Y only deals with the attempt by a dealer association to pass on general information with reference to W.P.A. biddings, and there is no proof that other manufacturers were involved. Alpha wanted to know if all dealers were listed, or if non-members were listed (Com. Exs. 867-7B, 6Y).

7. Exception is taken to any inference that manufacturers collectively classified, listed or checked dealers and to the failure to report that Alpha's action was not typical of other respondents (Tr. 28557-58; 30672-75; 32839-40; 33243; 6483; 6659; 36204-05; 36223-24; 36230-31; 37216-17; 37529; 37935; 38640; 38719; 39548-49; 39551; 39857-58; 41506-07; 41631; 42332; 42414; 46900) and that Alpha's acts were not the result of any agreement with any other respondent (Tr. 23638-39).

"Confining Sales to the Dealers Locality"

Paragraph 147

1. Exception is taken to the failure to report the following in Paragraph 147:

Manufacturers have found that when they delivered cement to a dealer at points other than where the dealer had a warehouse the local dealers complained (Tr. 6808; 4347-49; 4350-53; 4329-30; Com. Exs. 2217; 202-2B-2C; 877 i, J; 2252; 304 A, M; Resp. Exs. 2693 C; 1610 A-B; 1474 A-B; 2663; see also: Com. Ex. 877 N; Resp. Exs. 2678; 1775; 1473; 1474; Com. Exs. 877 i, J; 547-2d, 2i, V, U, M; 2252; Tr. 33245-46; 4329-30; Com. Exs. 2469; 2470; 202-2A). Under those circumstances manufacturers were afraid of losing the business of dealers located at the point of delivery and they sometimes discontinued making such

shipments (Tr. 37529; 39293-94; 39571; 39885-89; 29123-24; Com. Exs. 735 A-B; 1442; Resp. Exs. 2687; 2688; 2689; 2690; 2691; 2692; 2693; 3116 A-D, H-J). Manufacturers also found that the dealer who took delivery at a point where he did not have a warehouse was not in a position to render satisfactory service (Tr. 36963; 41803-05). The evidence shows that the Institute took no position with regard to this matter and refused to act when requested to do so by dealers (Com. Exs. 202-2B-2C); and that there was no agreement among respondents concerning the place where sales were made to a dealer or the use to which he put the cement (Tr. 39571-72; 37529-30; 34573).

Respondents have never attempted to exercise control over the ultimate destination once cement has been delivered to the dealer (Tr. 6174; 40244-45) or over the dealer's price for the cement (Tr. 12031-32; 12044; 12068; Resp. Ex. 3788).

Neither the February nor April 1935 policy of any respondent contained a provision concerning this matter (*Cf.* Lehigh, Com. Exs. 643 B-C; 2262 A-B). When cement is sold at delivered prices the manufacturers' retain control over the cement until delivery is made (See all contract forms, for example, Resp. Ex. 1695). There is no evidence that dealers normally request the right to ship cement to points other than the location of their warehouses or that a substantial number have ever done so. [This subject is a problem apart from the question of diversion of cement in transit which is covered in the exceptions to Paragraph 123 and following.] There is no universal practice or "general policy" among the respondents with reference to requests made by dealers for shipments to other destinations. Some companies make such sales if they do not have a dealer located at the delivery point in question (Resp. Exs. 2586; 2566; 523; 524; 1475; Com. Ex. 270 A; Tr. 7355-56; 37529; 39885-88). Other companies ask the approval of their dealers located at the final destination. Still other companies have habitually quoted such dealers while others have made such shipments from time to time (Com. Exs. 1131 C-D; 202 Z-2A; 547 T; Resp. Exs. 730; 3116 A, D, E; 523; 524; Tr. 32834; 6805-07; Resp. Exs. 3116 A-D).

2. Exception is taken to any inference that the acts described in Paragraph 147 were carried on pursuant to or as the result of a conspiracy or agreement, on the ground that such an inference is not supported by the evidence and on the further ground that the existence of a "general policy in the industry" is not supported by any of the record references cited in the report. The Report confuses the problem of attempting to control the cement after delivery has been made at the dealer's destination pursuant to contract, with the subject of willingness to sell cement to a dealer for delivery to destinations other than where he has warehouses, and the further subject of preventing fraudulent diversions in transit. Attention is specifically called to Tr. 7356 cited in the Report where the witness Ackerman of Lawrence, testified that Lawrence has not always confined its shipments to a dealer's home town. A few companies under certain circumstances have individually refused to make such shipments but there is no evidence of any agreement about such a practice (Tr. 34573; 36214-15; 37529-30; 39571-72).

The statement contained in Paragraph 147 of the report would be substantially correct if it substituted "dealers" for the word "manufacturers" at the beginning of the sentence so that the reasons following (a) and (b) would be reasons why dealers opposed such selling and not reasons for manufacturers opposing such selling (Tr. 4347-49; 4350-53; 6808; Com. Exs. 2117; 202-2B-2C; Resp. Exs. 2693 E, C; 1610 A-B; 1474 A-B; 2663). The citations in the Report support the exceptions of respondents; these citations show that dealers opposed this practice because it upset their prices.

3. Exception is taken to the failure to report that not only dealer organizations but also individual dealers were opposed to such activities (See citations to Exception No. 1, *supra*).

4. Exception is taken to Com. Exs. 1131 N and o; 546-2K-2L; 20-2P; 547 A, B, F, G, H, i, J, K, L, M, T, Y, Z, 2A, 2B, 2C, 2D, 2i, 731-4U, 4V because they do not support in any way the statements for which they are cited.

"Uniform Terms and Discounts"

Paragraphs 148-150

1. Exception is taken to all of the statements in Paragraphs 148-150 because they imply that respondents have acted as a group in the development of uniform discounts and terms of sale and that *all* respondents have acted similarly, whereas the evidence does not support any such implications.

Typical of the vague, misleading and unsupported phrases are the following: In Paragraph 148, "respondents maintain", in Paragraph 149, "the industry adopted" and "it has followed since that time"; in Paragraph 150 "as perfected" and "respondents maintained".

2. Exception is taken to the implication in Paragraphs 148-150 that there is any greater or less uniformity in terms and conditions of sale since 1931 or since the Code than there had been previously on the ground that it is not supported by the evidence and further exception is taken to the failure to report as follows: During the past twenty years or more the published discounts and terms of sale in any one marketing area have been substantially the same. In each case the most favorable discount and terms offered by any competitor were immediately met by the other competitors for the same reason that lower prices must be met. (Tr. 6612-13; 41818-19; 40064; 38961-62; 37709; 36820-21; 35918; 33147-49; 26706-07; see exceptions to Paragraphs 88-93, *supra*). On the other hand until the NRA Code (see below) published discounts and terms have been different in different marketing areas (Com. Exs. 1214; 1219; Resp. Exs. 594; 2276; 3157 M, N; Tr. 46857; 41659-60; 23404-07; Resp. Ex. 565; Tr. 47314; 42903-04; 47037-38; Resp. Ex. 3628; Tr. 33151; 23349-50; Resp. Ex. 531; Tr. 42905; 42488; Resp. Ex. 3444; Tr. 23387-88; 48121-22).

The necessity for speedy and unanimous agreement on an NRA Code obviously led to the compromise of whatever differences there were in the terms and discounts as between different marketing areas. To this extent, therefore, but only to this extent did the NRA Code effect a "greater uniformity". The necessary uniformity in a given marketing

area had always existed (Com. Ex. 557; Tr. 23593; 36186; 31261; 42488; 38989).

Despite NRA many respondents made no substantial changes in their contract forms to conform to those appended to the Cement Code (Tr. 37618; Resp. Exs. 2822; 1441-42; Tr. 28082). Many respondents have made no changes in their contract forms or published terms of sale since NRA went out of existence because they have found them satisfactory to themselves and to the trade and have had no business reasons for altering them (Tr. 30573-75; 28083; Resp. Exs. 1442; 1692; Tr. 28908-09; 39509).

3. Exception is taken to the failure to report in Paragraph 148 that there have been frequent deviations by various respondents from their published terms and discounts (Tr. 32815-16; 37706; 42293-94; 35915; 37386; 32815; 34632-33).

4. Exception is taken to the statement in Paragraph 150 "In other less important particulars respondents' terms and conditions of sale are similar, and in some there are non-essential variations at various times, as can be seen from the exhibits cited and numerous similar exhibits placed in evidence by both sides". This statement is not supported by the citations or by the evidence.

5. Exception is taken to the failure to report in Paragraph 149 regarding the use of a "specific sales order" form, that numerous respondents discontinued using specific sales order forms at various times subsequent to the *Schechter* decision. (Tr. 28579-80; 28904-05; 42025-26; 39508-09; Resp. Ex. 3017).

6. Exception is taken to the implication that the statements in Com. Ex. 1174 K represent the views of more than one respondent. There is no evidence that they do.

7. Exception is further taken to the failure to report the evidence showing that the discounts and terms of sale used by the various respondents have not been arrived at and are not used through any understanding or agreement with competitors (Tr. 23467-68; 32174-75; 47066-67; 47119; 35784; 29535; 26527-30; 36250; 36335; 26821-22; 33074;

34560; 37286; 39510; 39517-18; 39706-07; 28208; 33149-50; 36610-12; 37844; 37929; 37561; 28912; 42896; 42902-03; 34909; 34993-94; 35988; 47663; 48110; 48118-19; 48121).

8. Exception is further taken to the failure to report that non-respondents and non-members of The Institute use the same discounts and terms of sale that are used by respondent competitors (Tr. 12774; Resp. Exs. 3367-68; Tr. 41553).

"Imported Cement and Zone Prices"

Paragraphs 151-158

1. Exception is taken, generally, to the assertions in Paragraphs 151-158, for the following reasons:

They do not fairly or adequately report the evidence regarding the circumstances under which the competition of imported cement has been met by domestic cement manufacturers, the policies which have been adopted by any respondent with respect to such competition, or the manner in which any respondent determined the prices at which it quoted or sold its cement in attempting to meet such competition. The references cited are not representative or typical of the evidence, either regarding the respondents mentioned therein or regarding the other respondents, and the references are misdescribed and misinterpreted.

On the basis of selected excerpts from statements made by representatives of one respondent, or a few respondents, without reference to the context or substance of the evidence adduced in behalf of the individual respondents, they erroneously impute to all respondents in all competitive areas at all times the universal use of a system or formula of pricing (See also, exceptions to Paragraphs 88-92, *supra*).

2. Exception is taken to the phrase "cement industry" in Paragraph 151, because it implies that the respondents, or some of them, have taken concerted or collusive action with respect to imported cement. There is no evidence to support such implication and none cited. Exception is

further taken to the failure to report the evidence refuting any such implication (Tr. 7880-81; 29152; 32174; 29604; 38766; 30173; 34325-26; 37127-28; 41614; 36488; 30761; 26478-80; 28170; 26196; 27451-52; 26973; 36995; 23858-60; 23847-50; 39706; 28202-03; 27473; 33872-74; 20658-59; 19021-22; 19052-53; 39132-33).

Exception is taken to the failure to report that the evidence showed that the great majority of the respondents have never come into competition with imported cement and an even greater number have never taken any action, or adopted any policy with respect to the competition of imported cement (Tr. 29604; 35920; 30173; 29151-52; 37753; 42195; 41614; 41965; 34325; 36995; 36335; 29537-38; 30761; 32174; 31699; 36335; 39859; 29604; 38766; 34325-26; 37127-28; 36488).

3. Exception is taken to the use of the phrase "for some years" in Paragraph 151 and to the failure to report that domestic manufacturers in seaboard areas have always had to contend with the competition of foreign cement (Tr. 6530; 28531; 26192; 26194-95; 32893-94; 42860-61; 42870-71; 7808-09; Com. Ex. 2878 D; Resp. Ex. 411).

4. Exception is taken to the further failure to report the following:

Importations along the Atlantic seaboard and the Gulf coast have affected a large area inland as far as 100 miles (Tr. 8264; 39593; 7374; 28138-39; 27445-47; 39314-15; 26192; 32891-92; 6534-35; 8229; 38302-03; 8219). Some small respondent companies market their entire output in areas which have been affected by imported cement. At various times from 25 to 75 per cent of the total sales of some respondents doing business in the seaboard areas has been affected by the competition of imported cement (Tr. 28529-30; 26191-93; 23817; 28142; 27445-47; 8264-65; 7521-22; 8229; 28144-45).

From 1925 the effect of imported cement upon the domestic companies doing business in New York, Boston, and in the areas around the south Atlantic and Gulf ports continued to be severe. In 1931 and 1932 the volume of imports increased. At the same time domestic sales volume

was low, domestic industry was in a depressed state and all producers were selling at a low price level (Tr. 24793; 7640; 7879-80; 7373; 26940; 26944-45; 7465-66). In 1935, 1936 and 1937 there was a steady increase in importations of foreign cement from Poland, Germany, Norway, Russia, Yugoslavia and Belgium as well as from Holland and Denmark which came into American seaboard markets regularly in large quantities. Belgian cement, produced and sold under subsidy by the Belgian Government had the advantage of the reciprocal trade treaty and reductions in duty, and was imported all along the Eastern and Southern coasts as far as Corpus Christi, Texas. Further proof regarding the advantage enjoyed by foreign cement was rejected (Tr. 33851-52; 33861-62; 26944-45; 7373-75; 7441-43; 7473-74; 7477; 26967; 38301-02; 39314-16; 23975; 23985; 8264-65; 38301-02; 8219-20; Resp. Exs. 716-18; 1255; 1261; 1268; 1279; 1269; 1270; 1271; 1280; 1272-76; 1295 A-C; 745-46 for id.; 749 for id.).

5. Exception is taken to the failure to report the following in connection with very low prices quoted by some respondent companies to meet the competition of imported cement:

In order to compete with domestic cement, imported cement had to be sold well below the price of domestic brands because of several important factors favoring the domestic product, among which are availability on short notice for overnight delivery, in bulk or in cloth packages, in small quantities, and tested at the point of use (Tr. 26215; 26964-65; 28201; 23838-39; 6919; Com. Exs. 295 A; Tr. 26218-20; 7375-76; 7445; 7471); interchangeability of domestic brands because of standard quality (Tr. 38630; 34859-60; 7376; 40073; 7902; 36794; 39135; 36797-99; 28537; 28202; 23837); and price protection at the lowest market price for contract work, whereas foreign cement offers no protection against price advances (Tr. 7773; 26965; 7470; 7769-70; 6586).

Importers sold foreign cement in this country at prices well below domestic prices and often below the cost of manufacture of American brands. This was possible because of the low cost of transportation of foreign cement

from Europe to the principal Atlantic ports of entry which, *e.g.*, was lower than the cost of transportation from the Lehigh Valley to those ports; European cement was often shipped to America as ballast; European labor costs were about one-third of American labor costs (Tr. 7377; 7448; 26953-55; 38626; 40073; 28567; 34955; 6655).

Some domestic companies, acting individually and independently, gathered information concerning the prices of imported cement, and from time to time attempted to meet them, but in most instances the price of imported cement was further reduced. Domestic prices approached within 20 cents of the foreign cement prices. Price differentials between imported cement and domestic cement vary in the different ports because of differing competitive conditions and geographical situations. The respondents, by lowering their prices to compete with imported cement, lost considerable money. Further proof as to the losses suffered by respondents who attempted to meet the prices at which imported cement was selling, was rejected or stricken over objection (Tr. 6823-24; 26192; 26949-50; 26967; 28141-42; 8211; 7465; 8229; 20651-52; 28414; 27446; 24106; 33864).

6. Exception is taken to the assertions in Paragraph 151 because they imply that prices quoted by the respondents, or some of them, consist only of so-called basing point prices and so-called arbitrary or flat zone prices, and that they are regularly computed on some formula, pattern, method or practice of pricing. There is no evidence to support any such implication. Exception is taken to the use of the expression "in order to be matched", in referring to prices quoted by some of the respondents, on the ground that there is no evidence to warrant the use of such phraseology and none cited (See also exceptions to Paragraphs 88-92, *supra*).

7. Exception is taken to the failure to report the following: Some respondent companies have attempted to meet the competition of imported cement, which was shipped into New England and into parts of New York State and New Jersey and other inland points from Boston, New York, Baltimore and other northern Atlantic ports, by quoting prices which reflected the estimated cost of

transportation from the port to the inland point; the patterns of these price quotations were determined by the nature of the competition in those markets and the available transportation facilities; they conformed generally to the patterns which imported cement prices exhibited in the same areas. For more than 25 years prices quoted in these coastal markets have exhibited this general pattern, which has been described as "feathering out" (Tr. 26828-29; 26823-24; 26955; 6298-99; 3938; 24532; 24785-86; 27447-48; 6042-43; 6530-31; 6532-34; 6765-66; 7348-49; 8210-11) (See also exceptions to Paragraphs 88-92, *supra*).

Some domestic manufacturers in response to demands from dealers that they be put in a better position to compete with dealers selling foreign cement gave refunds and special prices (Tr. 28531; 33050; 7924; Resp. Ex. 1277).

In some coastal markets commodity rail rates were published for cement moving inland from the ports and the prices at which foreign cement was being sold reflected the varying costs of rail transportation based on the price at which foreign cement was selling in the port. Some domestic manufacturers, individually, used the current market prices at the ports as bases to which they added the cost of transportation to inland points where foreign cement was being sold. The prices quoted by respondent companies to meet the competition of foreign cement at inland points also reflected the costs of transportation from the ports of entry as did the prices quoted by the non-respondent companies doing business in those markets (Tr. 4491; 23847; 23850-51; 26953-54; 4479; 26949-50; 26955-56). This pattern has occurred in some coastal areas from time to time since 1905 (Com. Exs. 2878 C, D; Resp. Ex. 404; Tr. 26196-97; 38629; 38626-27; 23850; 26950-54; Com. Ex. 1133).

In some markets the special prices to meet foreign competition were so low that some respondent companies declined to meet them and lost business (Tr. 26955-56; 28531; 6652; 26197; 2622-27). Others met these prices in order to retain their trade and keep the good-will of established dealer accounts; they had no alternative except to withdraw from the market (Tr. 28531; 28414-15; 23840; 27473;

27448-50; 6905-06; 39593; 7349; Resp. Exs. 1131-1298; 1388-91).

Some respondent companies have never quoted any special or so-called arbitrary prices for their cement. Some respondents did not quote any special prices to meet the competition of foreign cement but attempted to meet it with a cheaper brand of cement; other respondents met this kind of competition with increased and intensified sales efforts. The non-respondent domestic manufacturers selling in the markets affected by the competition of foreign cement met the special prices quoted by some of the respondent companies when they wanted the business, but did not quote lower prices (Tr. 8862; 7706-07; 48120-21; 29538; 30761-62; 39136-37).

8. Exception is taken to Paragraph 152 because it fails fairly or accurately to report the evidence regarding the policy of Lone Star with respect to its dealers who carried and sold foreign cement, as follows:

In November, 1926, Lone Star inaugurated at Boston, and Tampa, and in 1929, at New Orleans, a policy of confining the sale of Lone Star Cement to purchasers of cement produced under American standards of wages and living. Evidence was offered to show that this policy was broadcast publicly to its trade on November 1, 1926, with the following explanation:

> "that imports produced in countries where the standard of wages and living is far below that enjoyed in this country and is robbing American labor, transportation and industry; we can only consider such importers and dealers as foreign competitors, and beginning November 10th it shall be our purpose to confine the sale and use of Lone Star cement to purchasers of cement produced by American competitors under conditions similar to those under which we operate" (Resp. Ex. 2365 for id.).

A similar policy had been used by Lone Star with considerable benefit to the company at its Cuba plant in 1922, at its Argentine plant in 1923 and at its Uruguay plant in 1924. When confronted with the same conditions in the United States, therefore, Lone Star adopted the same policy

without any contact, or understanding, with any competitor. It was enforced only spasmodically, as necessary routine reports were obtained by Lone Star from its salesmen concerning the dealers who were handling foreign cement. These were not made available to any other manufacturer, nor did any other manufacturer ever make such information available to Lone Star. Lone Star for many years refused to sell such dealers when many other respondent companies doing business in the same competitive areas did sell to such dealers (Tr. 23859; 24794; 24289; 26957; 28146; 32894-95; 32903-05; 32907; 33031; 33037; 33052-56; 33048-49; Com. Ex. 1179 B; Resp. Ex. 2359). This was confirmed by the testimony of the Government witnesses, one of which testified as follows:

> "Lone Star did not care what its competitors did; it did not sell such a dealer and had nothing to lose" (6569-70).

Respondents were deprived of the right to introduce further proof, particularly contemporaneous documentary evidence, in support of the foregoing and in contradiction of the statements reported here and elsewhere in the report (Resp. Exs. 2364-65 for id.; 2366 for id.; 2368 for id.; 2371 for id.; Tr. 33039-43; 33044-47).

9. Exception is taken to the failure to report that the circumstances regarding Lone Star's use of this policy (see *supra*) in New York were as follows: In December, 1932, several Lone Star dealers in Brooklyn, N. Y., began selling foreign cement, when available, to the exclusion of Lone Star cement and using Lone Star only as a convenience. The dealers who handled foreign cement were found to be those who served speculative building operations where imported cement was often satisfactory. The better dealers from the standpoint of volume of purchases did not as a rule handle imported cement. Accordingly Lone Star Company extended to Metropolitan New York, its policy of confining its sales to dealers who did not distribute foreign brands (Tr. 26204-05; 26199; 26475-76; 27455-56; 26963).

10. Exception is taken to the statement that Lone Star's policy has not been formally abandoned, and to the failure

to report that Lone Star has not had such a policy since 1935.

11. Exception is taken to the assertion in Paragraph 153 that "all respondents operating in the New York area adopted this policy of refusing to sell dealers handling foreign cement" on the ground that it is not supported by the evidence; exception is further taken to the failure to report regarding the use of similar policies by certain respondents as follows: Other respondents learned through contacts with their dealers that Lone Star had such a policy and these dealers seemed pleased with it (Tr. 6572-73; 7924-25; 26203-04; 26476). Some of these respondents accordingly, adopted the policy (Tr. 26956-59; 28151-54; 28145-48; 35767-68; Resp. Exs. 1443-44).

The experience of one of them is shown by a letter from its eastern sales manager to the company's district sales managers as follows:

> "During the past few days your salesmen have reported that they are finding some cement manufacturers notifying the trade that dealers handling foreign cement will be considered as competitors and that they will decline to sell their product to such dealers so long as these dealers are selling the foreign products.
>
> "We consider this move a most constructive one, it seems to us to offer the only practicable defense open to the American manufacturer against the competition of foreign cement under existing European currency depreciation.
>
> "Effective immediately, we will adopt the same policy. Please explain to the various dealers concerned that this step is taken as the only means open to us for defending our position and for cooperating with the many dealers whose loyalty has been shown by their refusal to handle foreign cement.
>
> "It will be entirely in order for you to admit frankly to any dealer that we are following the policy established by other manufacturers because we think it sound from the standpoint of both the dealers and ourselves. We do not know that other manufacturers will see fit to adopt the same policy and whether they do so or not will have no bearing on our own course. Our position is that the dealer

> who handles foreign cement is in reality our competitor, and as such we cannot see our way clear to sell him Lehigh cement" (Com. Ex. 1171).

Another respondent which adopted a similar policy instructed its salesmen to this effect:

> "These dealers who do not handle foreign cement are entitled to our first cooperation to help us sell our product against the importer-competitor who is merely trying to use us as a convenience" (Resp. Exs. 1443 A, B; 1444 A, B; Tr. 28147-50; 28082-88; see also 28145).

A number of the respondents doing business in competition with foreign cement, including some of the respondents who were regularly shipping into the Boston and New York areas, never adopted this policy or anything similar to it and never instructed their salesmen to refuse to sell to such dealers. There was a considerable variation in the application of the policy by those few respondents who adopted it: some did not apply it to all dealers who handled foreign cement; one applied it to all dealers who handled foreign cement; one applied it only to dealers who were handling large quantities of foreign cement; one applied such a policy on only one order; one respondent for a short period ceased to solicit business from dealers it knew were handling foreign cement, but never refused any orders from any such dealers (Tr. 27292-93; 6560; 6812; 6827; 33872; 7661; 23858; Resp. Exs. 1443 A-B; 724).

During the period reported on in Paragraph 153 some respondents, in the New York area, as well as elsewhere, sold to dealers who handled foreign cement and there was no time within that period when any dealer in New York could not get all the domestic cement he wanted. Commission's witnesses stated that the preference of government agencies for domestic cement was partly responsible for their giving up the handling of foreign cement during that period (Tr. 23837; 28163; 3123-24; 7644-45; 7902; 7661; 7667; 28532-34; 24288-89; 6812-13; 27811; 40073; 31698-700; 42895; 39593; 48121; 39133; 39136; Resp. Ex. 1273).

12. Exception is taken to the continual use of the phrase in Paragraph 153, and elsewhere, "other respondent com-

panies'' without identification or specification of what companies are referred to, and to the implication that the statements made, or any part of them, are applicable to all respondents.

13. Exception is taken to the statement and reference to ''North American, Lawrence'' in Paragraph 153, on the ground that it misstates the references given, and there is no evidence to support it. Moreover references are cited in Paragraph 153, which the transcript shows to have been stricken or deleted.

14. Exception is taken to the use in Paragraph 153 of the expressions ''spying'', and ''salesmen from these and other respondent companies rotated in these activities'' because they erroneously imply that the respondents or their salesmen engaged collusively in watching or recording what dealers were selling foreign cement. Exception is taken to the statement ''dealers in foreign cement were listed'' because it erroneously implies that the respondents, or some of them, made, kept or used a list jointly or with other respondents. There is no evidence to support any such implication. Exception is taken to the failure to report the following evidence: Some of the respondents attempted individually to determine what dealers were handling foreign cement through reports from their own salesmen or other dealers. This was the only source of information that any of the respondents pursued (Tr. 27460; 7347; 28160-61; 7558; 35768-69; 34089-90; 27453; 6816-18; 6558; Resp. Exs. 1295; 716-18; 1278; 1268-71; 1274-76; 1280; 1272-73; 1257; 1277; 1279).

Respondents doing business in coastal markets have always had standing instructions for their salesmen to keep posted on all competitive conditions in their sales areas, including every detail concerning foreign cement. It has always been routine practice for salesmen of such companies to report periodically on the kinds, types and quantities of cement being handled by customers and prospective customers they call upon. During the period referred to as well as for many years prior thereto, salesmen were acting under general instructions to keep their companies informed at all times of what brands the dealers were handling.

Further evidence offered by respondents on this subject was rejected by the Examiner (Tr. 23863; 28534; 28163; 26199; 26207-08; 28534; 28167-70; 6556; 35769; 7557-58; Resp. Exs. 1445-53 for id.).

Some respondents who had some policy regarding sales to dealers handling foreign cement gave different and varying instructions to their salesmen. Some gave no special instructions to their salesmen other than the fact that they were to accept orders only from dealers handling American brands (Tr. 27457; 26199; 26203; 27454; 27462-63; 7346-47). Some gave instructions to keep the company posted as to who was handling foreign cement and to what extent (Tr. 24795) and gave them considerable latitude as to the collection of such information (Com. Ex. 1171; Resp. Exs. 1443-44; Tr. 28147-50; 26961-62; 23860-61; 24795; 6553-54). There was no agreement or understanding among any respondents concerning the policy or the method of applying it (Tr. 27463; 27452; 26199; 7920-21; 7880-81; 6819; 23860; 33874-75; 28158-59; 33769).

15. Exception is taken to the use in Paragraph 154 of the phraseology "this plan", "generally observed", "Boston dealers", "the same restrictions", "boycott", "tension", and "these activities" because they erroneously imply that there was some collusive plan or scheme in operation between two or more respondents.

16. Exception is further taken to the assertions in Paragraph 154 because they imply that The Cement Institute took action regarding the subject of dealers who handled foreign cement and that the abandonment of the policy by Alpha resulted from the resolutions of dealer associations or the dispatch of such resolutions to The Cement Institute; neither implication is supported by the evidence.

17. Exception is taken to the failure to report the following:

The respondents which adopted a policy of limiting the sale of cement to purchasers of American brands did so independently and individually and had no agreement with any competitor at any time that they would or would not sell to such dealers. There was no agreement or under-

standing concerning the origin of this policy or its adoption, non-adoption, or discontinuance by any respondent (Tr. 23860; 26476; 26206; 26973; Com. Ex. 1171; Tr. 27452; 33874-75; 6568-72; 28158-59; 28535; 35769; 7920; 7880-81; Resp. Exs. 1443-44). The Cement Institute had nothing to do with any respondents' policy toward dealers in foreign cement and never took any position on the matter. This policy was not discussed at any Institute meeting. Commission's dealer witnesses testified that there was no contact or communication between any of the respondents and any dealer group, or association of dealers concerning the sales to dealers who handled foreign cement (Tr. 6816; 26208; 27461; 26210-11; 23868; 7880-81; 19048).

18. Exception is taken to the assertions in Paragraph 155 because they imply that the new lower prices which were initiated in 1935 flowed out of or were connected with the abandonment of individual company policies regarding sales to dealers who used only American brands. There is no evidence to support such implication and none cited.

19. Exception is taken to the failure to report regarding the circumstances under which these prices were initiated and discovered as follows:

North American initiated these prices by quotations to its trade, and respondents competing in the same markets discovered them individually in the regular course of business through their salesmen and dealers. Also, North American availed itself of the opportunity to file these prices voluntarily with the Institute. Competitors, however, learned of the existence of these prices from the field as stated above, before the new prices were reported by the Institute. Knowledge of the special stocks of cement first established by North American in Brooklyn became general in the trade within a few hours after they were established (Tr. 27465; 26214; 7923-24; 26477; 26214; 26212; 28180; 8257; Resp. Exs. 1457-63).

20. Exception is taken to the vague, indefinite expressions, "they", "the other respondents", "they sold", "filings were made", and "sales were found" in Paragraph 156 without qualification, specification, or indication by

whom, when or where, because they imply erroneously that the contents of the paragraph are applicable to all respondents doing business in the areas mentioned. No such implication is supported and the evidence is to the contrary (Tr. 28536; 40073; 30761; 27811).

21. Exception is taken to the failure to report the following: None of the respondents which established stocks in Brooklyn for f.o.b. dock delivery had any contact with competitors regarding the origin or adoption of this new policy. A few companies individually, met that competition in order to maintain their positions in the markets. They had no choice except to make their product available for delivery to trucks and to meet the reduction in price or forego the business. The companies which sold cement at those prices suffered serious losses because the prices were so low (Tr. 26477; 28177; 30761; 26218; 27471-72; 33859; 33078; 35771; 33875; 28536). Many companies which were in competition with imported cement, including some companies doing business in the Metropolitan New York area, never established any stocks of cement in Brooklyn. The depressed prices in Brooklyn were never discussed at any meetings of the Institute (Tr. 26213; 28536; 30761; 33875; 29538; 27685; 27811; 26208; 27461; 42670; 48121; 26748-81; 36335; 39859-60).

22. Exception is taken to the phrase "Boston situation" in Paragraph 156 and the phrase "later zone prices" in Paragraph 157, because they imply that there was some relationship or connection between the special prices quoted by some of the respondents for cement from Brooklyn stocks and the prices quoted by some of the respondents in the New England area in December, 1936, or thereafter and there is no evidence to support such implication.

23. Exception is taken to the failure to report the following: Domestic cement companies meeting the competition of imported cement were faced with the certainty of losses because of the extremely low prices which had to be met or approached (See exceptions to Paragraph 50, *supra*). Accordingly every effort was made to meet the imported cement competition in kind, *i. e.*, to go no further than was

absolutely demanded by existing circumstances (Tr. 6585-86; 27448-49; 28171; Resp. Exs. 1111 A-C; Tr. 26658). Thus, when Brooklyn stocks were established by North American for delivery f.o.b. at reduced prices it intended to limit deliveries to Brooklyn dealers because they were the ones who had access to imported cement stocks at Brooklyn docks. When foreign cement sales were extended beyond Brooklyn, North American extended the facilities of its Brooklyn stocks accordingly (Tr. 26215-16; 28193-94; 27467; 6579; Resp. Exs. 1454-56; Tr. 7921; 7925).

The so-called "two" New England prices were founded on the same principle. Imported cement, generally, was not available on contract work requiring future delivery and protection for the dealer or contractor at the lowest market price current at any time during the period of delivery. Therefore the low prices established to meet imported competition were not extended to prices or contracts for future delivery because in that respect imported cement was not competitive (Tr. 6586; 26212; 26215; 28192; 27466-67; Resp. Exs. 1270-76; 1280; 1255; 1261; 1268; 716-18).

24. Exception is taken to the assertions in Paragraph 157 regarding the discontinuance of special prices for cement sold from Brooklyn stocks on the ground that they are not supported by the references cited nor by other evidence and further, because the paragraph places an erroneous and inaccurate emphasis on the evidence. Exception is taken to the failure to report the following: North American was affected by the competition of imported cement in the sales territories of all three of its mills. The idea of establishing special stocks in Brooklyn was developed by North American's sales manager without any contact, understanding or agreement with competitors. Lone Star and a few other respondent companies who met this competition did not like the price or the policy and they met this competition only so long as they were required to in order to retain their position with their dealers. In December, 1935, North American withdrew its stocks and special prices because the importations of foreign cement had decreased and the cost of replenishing the stocks had

increased. Other companies which had established similar stocks, upon discovering this change of policy, discontinued their stocks and special terms of sale because they were not in favor of the policy and had met it only because of competition (Tr. 33076-77; 8258; 33861-62; 27469-70; 28195-96; 28200; 26967; 33859-60; 8245-47; 6582-83; 7929-30; Resp. Exs. 1372-73; 1464-72).

25. Exception is taken to the use of the quotation from Com. Ex. 286 D as though it were applicable to, or represented, the view or attitude of respondents other than Lone Star and to the failure to report that this was only the opinion of one representative of one respondent and not shown to have been adopted or acquiesced in by any other respondent.

26. Exception is taken to the failure to report that the references cited in Paragraph 157 show the following: Lone Star did not know, and had no means of knowing, whether any competitor in that sales area would continue selling to the trade at special prices and terms or at prices below its published quotations. It instructed its salesmen to check in the field to ascertain whether any changes in prices, terms or conditions were found and to keep the company advised. Lone Star did not establish these special prices; it simply followed the competition which it found in the field (See exceptions to Paragraph 36, *supra*).

27. Exception is taken to the use of the expressions "Respondents endeavored", "gave considerable trouble" and "Brooklyn selling from stock activities" in Paragraph 157, because they imply that the statements are applicable to all of the respondents and that there was agreement, understanding or collusion between two or more respondents to adopt the policy or do the things referred to. There is no evidence to support such implication and none cited. Exception is further taken to the failure to report as follows: The action of the North American Cement Co. in placing stocks in Brooklyn in July and in removing them in December was free, individual and unrestrained and not done with the advance knowledge or cooperation of any other manufacturer. None of the companies establishing

stocks in Brooklyn had any agreement or understanding with any other company to do so. Some of the respondent companies doing business in the Metropolitan New York area did not at any time establish cement stocks in Brooklyn or offer cement for sale on such special terms and conditions (Tr. 7920-21; 7880-81; 33078; 33959; 27473; 30761-62; 23858; 40073; 28536; 8257; Resp. Exs. 1454-63).

28. Exception is taken to the failure to report in Paragraph 157 the evidence concerning the policies adopted, individually, and the prices quoted, by the respondents which met the competition of foreign cement in the areas of the South Atlantic and Gulf ports (See Exception No. 7, *supra*).

29. Exception is taken to the assertions in Paragraph 158 regarding "zone, flat or arbitrary prices" on the ground that they are not supported by the evidence.

30. Exception is taken to failure to report, concerning prices at Vancouver, that the evidence showed that competitors had different prices which were higher or lower than the prices of Superior, Inc.; that Vancouver is an area of continual strife, with no identity of price among dealers (Tr. 8427-28).

31. Exception is taken to the statement concerning "flat prices" in Arizona on the ground that the tabulation (Com. Ex. 2833) purporting to show such prices was withdrawn and the testimony of Commission's witnesses relating thereto was stricken (Tr. 16194).

32. Tr. 33810 shows the contrary of the statement it is cited to support.

"Maintaining the Institute"

Paragraphs 159-160

1. Exception is taken to all of Paragraphs 159 and 160 on the ground that these paragraphs represent opinions and conclusions unsupported by the evidence.

2. Exception is taken to the failure to report the following regarding the subject matter of Paragraphs 159 and 160:

The functions of The Cement Institute have been limited solely to carrying out the purposes set forth in its Articles of Association. The Institute can only operate to bind its members as provided in the Articles of Association and no officer, trustee, committee, bureau or other agent has ever had any authority, express or implied, to take any action other than that authorized in the Articles of Association or ratified by the members in the manner provided therein (Com. Exs. 138 A-M; 561, pp. 5-10; Resp. Exs. 174; 175; 176 A-B; 2170 A-H; 2989 A-H; Tr. 16687-99; 16706-07; 16711-12; 16719-25; 16727; 16941-50; 16958-70; 23931-32; 27550-52; 27556; 27757; 33665-66; 33914-15; 36490-91; 36497; 37219-21).

At no time have there been any rules or agreements promulgated, supervised, or enforced by or through the Institute, its officers, trustees, committees, bureaus or other agents. The Institute has never had the authority, nor has it ever attempted, to exercise disciplinary or police powers over any of its members. It has never been a function of the Institute to formulate or to interpret the pricing or marketing policies of its members nor has it ever attempted to do so. The pricing and marketing policies of respondent companies have never been fixed, regulated or controlled by the Institute (Resp. Exs. 739; 740; 2116-17; Tr. 86; 2809; 2824-25; 3006-07; 3130-31; 3140; 4003-04; 5132-34; 8418; 8610-11; 8650-51; 8994-95; 16688; 16913-22; 16966-70; 16981; 17001; 17005; 17065-66; 17074-75; 17091-92; 23934-36; 23938-48; 26062-63; 26094; 26136-37; 26208; 26441-42; 27002-08; 27299-300; 27377; 27390-410; 27414-23; 27492; 27550-51; 27557-58; 27644-46; 27720; 27830-32; 27851-53; 27862; 28005; 28348-49; 28480; 28519; 28545; 28558; 28596; 28617-19; 28720; 28722; 28775-76; 29158-61; 29206-11; 29213-18; 29515-16; 29543; 29879-80; 30170-71; 30593-94; 30657-58; 30715-16; 30737-38; 31269; 31277-78; 31324; 31404; 31682; 31744; 32098; 32219; 32225; 32227-28; 32738; 33074-75; 33153-54; 33188; 33407-08; 33664-65; 33789-92; 33914-15; 33918-21; 34299-302; 34559-69; 34828-30; 34979-80; 35800-02; 35804-05; 35926-27;

36025-26; 36251-78; 36333-35; 36490-501; 36494; 36516-17; 36897; 36976-78; 37215-17; 37220-22; 37429-30; 37601-03; 37637-38; 37730; 37741; 38135; 38652; 38658-59; 38687; 38691; 38704-05; 38731; 38831; 38948; 39036-38; 39141; 39148-50; 39165; 39170-71; 39566-71; 39584; 39586-88; 39591-93; 39674-75; 39706; 39860; 39871-74; 40060-61; 41476; 41477; 41620-22; 41662-73; 41816-17; 41961-62; 42004-05; 42020-23; 42316-18; 42320-22; 42416; 42446-48; 42493-94; 42878; 42894-99; 42902; 42908-13; 42917; 46450; 46500-01; 46570-72; 46703; 46732-41; 46774-75; 46843-48; 46920-22; 46925-38; 46949-50; 46952-53; 47663; 47759; 47913-14; 48100-07; 48116-20; Resp. Exs. 89-90; 127 A-C; 740; 1099; 1369; 1418-19; 1617; 1618; 1848; 2183; 2466 A-F; 2530; 2542; 2587-602; 2646; 2711; 2794 A-D; 2932 A-B; 2934; 3381; 3410; 3426; 3508; 3583; 3584; 3661 A-F; Com. Exs. 597 A-D; 598 E-F; 637 BB; 1025; 2610 A-C; 2908; Tr. 4203-04; 4256; 4449-50; 4462-64; 9166-68; 14043-45; 14063-65; 14068-69; 14080-81; 16710-11; 16698-99; 16753-57; 16782-87; 16808-09; 16823-25; 17043-44; 17069-71; 17489-90; 23894-99; 23903; 23918-21; 24442; 25006; 25027; 26211; 26239-41; 26245-51; 26267-70; 26336-37; 26992-94; 27821-27; 27834-45; 29484-86; 29505-10; 29589; 30483-84; 30754; 30966; 34768-71; 34773-95; 35072; 33998-99; 34217-18; 34307-10; 35922-23; 36036-37; 36107-08; 36822-23; 36834-35; 37002-03; 37129; 37165-66; 37182-84; 37191-93; 37239-43; 37331; 37390-91; 37415; 37598-99; 37607-08; 37710; 37728; 37771; 38466-69; 38503-04; 38639; 38756-57; 38790; 39489; 39509-10; 40073-74; 40083-85; 40096-98; 40190; 40915; 40942-43; 41540-41; 41544-45; 41605-08; 42100; 42220-23; 42234; 42472; 42490; 42738; 46539; 46853; 46879; 47067-68; 47152-53; 47574-75; 47657; 47669; 47674-75; 47890).

3. Exception is taken to the statement that the Institute "represented" respondents on the ground it is not supported by the evidence.

4. Exception is taken to the failure to report that the respondent Valley Forge is not and never has been a member of The Cement Institute (See exceptions to Paragraph 74).

"Propaganda Re the Pricing System"

Paragraphs 161-162

1. Exception is taken to any implication in Paragraph 161 that the publicity of government officials concerning the cement industry was justified and to the failure to report as follows:

In 1933 and early in 1934, public officials led by Governor Harry Horner of Illinois and Secretary of Interior Ickes were carrying on a campaign in which they publicly made unfavorable criticism of the cement industry all of which was calculated to arouse and influence public opinion. Members of the industry considered the campaign was unfair and had the effect of misleading the public (Tr. 13050; 27849-51; 33916-17; 36511; 41622-23).

In order to defend themselves and to correct the erroneous impression of the industry created by these public officials, a committee was designated by some members of the industry and charged with the duty of acquainting the public with the basic problems of the cement industry. It was hoped that through this means a better understanding of the industry in the public mind could be secured (Tr. 13050; 27849-51; 33916-17; 36511; 41622-23; Com. Ex. 618 B).

2. Exception is taken to the statement that the Cement Information Bureau had anything to do with the publication of the series of advertisements referred to in Paragraphs 161 and 162 on the ground that it is contrary to the evidence. Further exception is taken to the failure to report as follows:

On February 21, 1934, the Board of Trustees of The Cement Institute authorized the appointment of a Committee on Public Relations to study all phases of public relations and to draft a program of procedure (Com. Exs. 618 B, F). This committee drew up a proposed plan but it was never approved by members of the Institute because of a difference of opinion among industry members as to how it should be developed. Without having secured approval, the Chairman of the Committee, in July, 1934, in

conjunction with a Chicago advertising agency had a series of eight advertisements prepared and published in several technical magazines. In August, 1934, he reported among other things that the series of advertisements had been published and that the total cost of the committee's activity to date had amounted to about $30,000. The Board of Trustees then authorized an assessment on members to produce this amount (Com. Exs. 619 B-C; 620 B; 621 D; Tr. 33917-18; 34134-36; 35336-39).

The Cement Information Bureau came into existence on August 1, 1934 when Col. J. B. Reynolds was employed by the Committee to handle the matter of public relations. The Committee itself was henceforth known as the Cement Information Committee (Com. Exs. 621 D; 1032 C; Tr. 4452).

3. Exception is taken to any implication in Paragraphs 161 and 162 that the series of advertisements referred to therein were arranged for the purpose of camouflaging any combination or were designed to mislead readers concerning basic facts of the cement industry. Such implication is contrary to the evidence (Tr. 13050; 36510-11; 41622-23).

4. Exception is taken to any implication in Paragraphs 161 and 162 that the Cement Information Bureau or the committee engaged in any further activities with regard to advertising after August 15, 1934 and to the failure to report as follows concerning the Cement Information Bureau:

The projected advertising campaign, which was to have continued, was terminated prior to August 15, 1934. Thereafter, the Bureau served for the most part as a newspaper and magazine clipping service for the benefit of members of the Institute and any others who might desire to take advantage of information so collected (Tr. 4452; 4456-57; 4471-72; Com. Ex. 1032 C).

The Cement Information Bureau and the Public Relations Committee were eliminated on September 10, 1936. During the period of its operation the Bureau's only em-

ployee was J. B. Reynolds (Com. Exs. 621 D; 626 D-F; Resp. Exs. 127 B-C; Tr. 13059-60; 33915-16).

5. Exception is taken to any implication in Paragraph 161 that either the Cement Information Bureau or the Committee engaged in activities relating to an anti-basing point bill on the ground that it is not supported by the evidence.

6. Exception is taken to the citation in Paragraphs 161 and 162 of Com. Exs. 438 and 836-3o because these exhibits were not received in evidence.

7. Exception is taken to the citation in Paragraph 161 of Tr. 3091-92 because it has no bearing on the matter for which it is cited.

"Dual and Area Bases"

Paragraph 163

1. Exception is taken to the failure to report the following in Paragraph 163:

In each instance where a so-called dual base was used, the evidence shows that the management of the mill which initiated the dual base did so independently to meet a particular competitive condition in the area served by the mill, and without prior notice to or consultation, understanding or agreement with any competitor. Moreover, the establishment of the second of the two so-called mill bases in each instance represented a reduction by the mill of all delivered prices in the area where the second base was effective (Tr. 24620-21; Com. Exs. 976-2o; Tr. 23127-29; 26908-11; 23994-95; 23278-80).

Such lower prices emanating from the second of the two so-called bases had to be at least met by competitors if they desired to sell in the affected area. The use of a so-called dual base was easily discovered by competitors by analysis of the prices reported by customers (Tr. 23279; 23282; 23284; 23129-30; 24619-20; 31317-18; 31222-23; 8111-12).

2. Exception is taken to the failure to report regarding the bases at the Lehigh Valley and Hudson River mills

that no particular "differential" has existed, and that at times they were the same and at other times they have differed (Tr. 24570-78) and to the further failure to report that the cost of producing cement is higher at the Hudson River mills than at the Lehigh Valley mills (Com. Exs. 971-7S.; see also exceptions to Paragraph 87, *supra*).

3. Exception is taken to the implication in Paragraph 163 that the price structure in the Lehigh Valley area and other so-called "common basing groups" arose out of any pre-determined or concerted plant to use a "common base price" and to the failure to report that the blanket freight rate structure existing for many years in the areas mentioned was sponsored by the interested railroads. This rate structure caused the use of an effective base by any one mill in those areas to reflect the same figure at all other mills in the district solely because of the identity of freight rates and the necessity of meeting the lowest delivered prices found (Tr. 38547; 38071-72; 38091-93; 38555-56; 46968-85).

4. Respondents were precluded from offering evidence to explain and clarify Com. Exs. 971-4V, 5C, cited to support conclusions drawn by the Examiner in Paragraph 163 (Tr. 38070; 38074-76; Resp. Ex. 2895 for id.; Tr. 38275; Resp. Exs. for id. 2897; 2898).

5. Exception is taken to the assertion that Lehigh varied its Mason City base to produce a minimum net of 80 cents per barrel since the evidence shows that Lehigh retained its base of $1.00 on the occasion in question, but refrained from meeting prices at destinations where, by reason of freight absorption, the mill net at Mason City went below 80 cents. This condition existed for only a few months (Com. Exs. 971-23P, cited).

"Price Leadership"

Paragraph 164

1. Exception is taken to the failure to report that the Burns and Clark Questionnaire answers of sixteen respondents and two non-respondents stated that no one mill or groups of mills was "the" price leader (Com. Exs. 967-12D; 969-8T; 969-11L; 969-13V; 969-10V; 969-13E; 7B; 967-16Y; 976-1P; 14K; 975-6V; 6B; 19A; 970-12R; 975-16U; 976-8W; 976-5F; 969-5I; 6L; 975-2R; 967-4X; 967-2F), and that this was confirmed by the testimony of executives of respondent companies and by a dealer in cement (Tr. 498; 26136; 30592; 30018; 29896; 32099; 36896-97; 40060; 37814; 7944; 8011). Exception is taken to the further failure to report that the evidence shows that at least twenty-eight respondents have initiated or attempted to initiate price changes upward or downward (Tr. 26505-06; 24639-41; 24580-81; 8903; 47144; 7157-58; 28173; 33794-96; 34035-36; 37693; 21668; 29568-69; 5084; 38634; 34474; 34221; Resp. Exs. 2407-08; Tr. 32099; 30809; 30049; 30040; 30041; Resp. Ex. 1222; Tr. 40052; 40056; 37370; 37502; 37516; 35907; 13738; 478; 26136).

2. Exception is taken to any implication in Paragraph 164 that individual and independent action by cement producers regarding their prices is restrained or restricted through any collective action by respondents or any of them, or restrained in any way other than through the play of competitive forces in the various markets. The evidence shows the contrary (Tr. 34663; 32227; 38144; 30788; 30579; 36125; 23060; 13742; 46937; 47022-23; 35805-06; 19546-47; 26127; 26930-31; 34663-64; 37795; 39035; 40056; 37123; 39706; 28170; 28203; 28357; 36546; 34002; 37605-06; 29582-83; 5085; 23169-70; 23206-07; 10595; 40048; 23376; 12257; 46921; 46938; 47900; 47912-13; 47147; 27449; 33869-70; 36043; 29543; 39851; 33150; 30039-40; 30061; 30171; 32104; 34230; 34248; 38705; 38782; 30792; 30809; 30593; 36285; 36335; 36334; 41815; 41733-34; 41620; 41673; 27852-53; 27720; 27866; 27818; 28519; 27518; 28764-65; 28810; 40056; 40615-16; 37741; 42085; 28775; 39141; 39165;

8903; 47661-62; 37605-06; 31939; 47633; 39594; 39632; 29571; 34801; 34830).

3. Exception is taken to the failure to report in Paragraph 164 the distinction between non-discriminatory price reductions which are made available to the entire trade in a sales area and discriminatory rebates and "price cuts" made to only some customers in a sales area and to the further failure to report as follows:

The period embraced by the references and instances reported was one of "guerrilla warfare" and "bitter competition" (Tr. 26850) and 1931 was a period of "price war" (Tr. 26893); the activity of the Lehigh Company during this period was governed by the problem of finding and meeting successively lower levels of prices, in large measure secret concessions, and at the same time trying to sell at openly published prices, maintaining thereby its reputation with the trade of not making sales at discriminatory prices (Tr. 26895-98); Lehigh reduced the base prices at its own mills about 60 cents or 70 cents per barrel, the effect of which reduced Lehigh's prices over the whole area of its respective plants, and in many cases unavoidably affected areas beyond those affected by the condition it was seeking to meet (Tr. 26902-05); the use by Lehigh of a base at plants of competitors was an attempt openly to meet the lowest levels of competitors' prices, secret and otherwise (Tr. 26907-08; 27271-72; 27275-76; 27280-81).

4. Exception is taken to each of the conclusions stated in Paragraph 164 and to reporting the opinion of one witness that "chain mills did not appear to consider local conditions" while no report was made of the abundant evidence to the contrary (Tr. 27114; 27220-21; Com. Exs. 971-9R; Tr. 23127-28; 23284; 23988; 24462; 40412-14; 38142-43; Com. Exs. 975-8A; 968-7K; 13T; 13G; 15Y; 13P; 160-16W; 17H; 15A; 15E; 968-13H; Tr. 23285-87).

For further exceptions to the subject matter of Paragraph 164 see exceptions to Paragraphs 104-13, *supra*.

"Price Rigidity"

Paragraph 165

1. Exception is taken to the failure to report that the undisputed evidence shows that the period 1930-1932 was one of countrywide price war (Tr. 33238; 26893-94; 26850; 12329-30; 33234).

2. Exception is taken to the statement that "basing point methods were neglected" because the evidence shows that prices continued to reflect bases to no greater or lesser extent during the price war period than they did before or since, although they were successively and ruinously lower during the price war (Com. Exs. 2150; 2155; 2162; 2168; Resp. Exs. 2497; 2493; 2490; Com. Ex. 2863; Resp. Ex. 2847; Com. Exs. 2620; 3155 B-C; Tr. 33419; Com. Exs. 2156; 1125; Com. Ex. 2872).

3. Exception is taken to the failure to report that price cutting has always been general and to the failure to report the evidence regarding price cutting as set forth in exceptions to Paragraphs 88-92, Section II, *supra*). (See also, *e.g.*, Resp. Exs. 3545; 3546; 3548).

4. Exception is taken to the failure to report any of the factors which are necessary for a fair consideration of the question of rigidity (these are set forth fully in Exceptions No. 2 (qq)-(tt), to Paragraph 227, *infra*).

5. Exception is taken to the unfair and inadequate report regarding the frequency of price changes, and to the failure to report the following:

There has been no country-wide level of prices at any time, the level in different parts of the country has differed in varying degrees from time to time in accordance with varying local conditions. (See: Resp. Exs. 754; 763-68; 774; 783; 785-94; 796 A-Z63; 819; 830; 836; 859; 902-06; 915-19; 930-38; 944-46; 953; 954; 968-73; 977; 979; 981; 1110; 1112 A-B; 1384; 1641 A; 1698; 1743; 2086; 2219-38; 2281; 2378; 2553; 2710; 2909 D-O; 3379 B-C; 3621 A-H; 3622 A-U; 3645 A-Z17).

Contemporaneous company records of delivered prices in various sections were offered by respondents to show

differences and fluctuations in prices, among other things, but these were rejected by the Trial Examiner (Tr. 35657; Resp. Ex. 2546-53 for id.; Tr. 38226; Resp. Ex. 2906 A-Z 206 for id.; Resp. Ex. 2218 A-Z2 for id.; Tr. 31721-23; 31730; Tr. 35310-11; Resp. Ex. 2526 for id.; Tr. 35357; Resp. Exs. for id. 1702-04; 2185-86; 2720 A-Z28; 2756; 2800-10; 2820 A-L; 2869 A-B; 3047; 3049; 3052 A-C; 3376 A-B; 3377 A-F; 3378 A-D; 3406 A).

A considerable body of other evidence bearing on the question of rigidity of prices was also excluded by the Examiner (Tr. 31266-67; Resp. Ex. 3068-88; Tr. 40384; 40651; Tr. 37294; 37301-03; 38230; 37947; 29611; Resp. Exs. 2527; 2528; 2529 for id.; Tr. 35321; 35327).

"Agreements, Understandings and Communications"

Paragraph 166

1. No exception is taken to the first full sentence of Paragraph 166 inasmuch as it is a correct statement regarding the testimony of each respondent. Exception is taken, however, to the choice of citations furnished by the Examiner in support of the statement on the ground that they do not fully or fairly represent the force of the many other items of evidence which support the statement. Exception is further taken to the failure to report regarding each respondent, that not only were agreement, understanding and combination as to the charges of the complaint denied, but also, to the extent permitted by the Trial Examiner, contemporaneous documentary records which corroborated the denials were offered for the record (See exceptions to Paragraphs 7-81, *supra*).

2. Exception is taken to the assertion in Paragraph 166 that "uniform adherence to zone or arbitrary prices", "conformity to dealer policies announced in March 1935", and "conformity to policies respecting trucking and diversions have not been denied except as to a few cases and circumstances", on the ground that there is no evidence of "adherence" or "conformity" in any sense of those terms, no evidence that any dealer policies were announced in

March 1935, no evidence that dealer policies announced by individual respondents at other times were identical either among all respondents or as among all sales areas, and no evidence that all respondents issued or announced "dealer policies"; and that the contrary is established by the evidence (See exceptions to Paragraphs 151-58; 139-46; 120-22; and 123-29; *supra*).

3. Exception is further taken to Paragraph 166 on the further ground that there is no evidence that the attitude of all or most respondents toward truck delivery of cement was uniform in theory or in practice and there is abundant evidence to the contrary; and on the further ground that there is no evidence that each or most respondents had any policy regarding diversions, or that those respondents that did, had uniform policies; and that there is evidence to the contrary (See exceptions to Paragraphs 120-29 and 7 thru 81, *supra*).

4. Exception is taken to the implication in Paragraph 166 that Paragraphs 1 through 166 set forth a fair and impartial report on "conditions and practices" "from which inferences as to collusion, agreement, concerted action or mutual understanding may or may not be drawn" on the ground that in the respects noted heretofore in these exceptions the report is not supported by and is often contrary to the evidence.

Paragraph 167

1. Exception is taken to the erroneous report in Paragraph 167 that Crescent, Tidewater and Huron were members of the A.A.P.C.M. during any of the time from 1902 to 1911. There is no evidence to support it.

2. The Standard Company referred to in Paragraph 167 is not the respondent Standard. The former operated a mill from 1903 to 1915 at Leeds, Alabama, and it ceased operation in 1919 (Tr. 38610-12). Respondent Standard was organized in 1924 and has a mill at Painesville, Ohio (See Paragraph 67; Standard's Answer, Par. IV).

Exception is taken to the statements that the A.A.P.C.M. "became active in the formulation and consideration of

better selling plans" and that "members • • • refuse to 'supply goods to a violator of a contract until the disagreement has been adjusted satisfactorily to the claims or adjustment committee of the association'" on the grounds that they are not supported by the evidence and there is no evidence that any such action was taken.

3. Exception is further taken to the failure to report the following:

In 1902 the Association of American Portland Cement Manufacturers was organized to establish a method by which a cement company could secure the return of the sacks marketed with its brand even though they were originally returned to another cement company (Tr. 48496-97; explaining Com. Ex. 3194; Com. Exs. 3235; Z63; Z64, pp. 39-40).

Most of the cement companies listed as members of the A.A.P.C.M. in Paragraph 167 are not respondents in this proceeding and are not even in existence. This includes the following companies: Alma, Alpena, Allentown, Alsen, American, Bonneville, Bath, Canada, Cayuga Lake, Central, Chicago, Continental, Crescent, Dexter, Dixie, Elk Cement & Lime, Empire, Egyptian, Fredonia, German American, Great Western, Hecla, Helderberg, Hudson, Illinois Steel, Iola, Iowa, Martins Creek, Maryland, New Aetna, Newaygo, Norfolk, Northampton, Omega, Peninsula, Pennsylvania, Penn-Allen, Phoenix, P. C. of Colorado, St. Louis, Sandusky, Security, Southwestern States, Standard, Texas, Thomas Millen Co., Tidewater, Union Sand, United Kansas, Virginia, Wayland, Western, Western States (Resp. Exs. 2405; 3764; 3765).

The following corporate respondents were never members of the A.A.P.C.M. Aetna, Arkansas, Beaver, Bessemer, Calaveras, California, Colorado, Consolidated, Cumberland, Federal, Florida, Georgia, Giant, Great Lakes, Green Bag of Pa., Green Bag of W. Va., Hawkeye, Hercules, Hermitage, Huron, Idaho, Keystone, Lone Star, Medusa, Missouri, Monolith, Monolith Midwest, National, Nebraska, North American, Northwestern, Oregon, Pacific, Peerless, Pennsylvania-Dixie, Petoskey, Pittsburgh Plate Glass Co., P. C. of Utah, Riverside, Santa Cruz, Signal

Mountain, Southern States, Southwestern, Spokane, Standard, Superior, Superior Inc., Three Forks, Trinity, Union, Universal Atlas, Valley Forge, Volunteer, West Penn., Yosemite. In fact, most of them were not in existence during the life of the A.A.P.C.M. (See exceptions to Paragraphs 7-81).

The only evidence supporting the conclusion that the companies listed in Paragraph 167 were members of the A.A.P.C.M. during the years 1902 to 1911 is that representatives of those companies were listed as attending A.A.P.C.M. meetings. The minutes of the A.A.P.C.M. meetings show that no effective action was taken by cement manufacturers on any of the matters referred to in Paragraph 167.

Paragraph 168

1. Exception is taken to the failure to report the following in Paragraph 168: The resolutions and other activities referred to in Paragraph 168 may have represented proposals but in no instance is there any evidence to show that they were put into effect at that time or any other time or that they have been continued during the past 30 years.

In spite of the supposed resolution in December, 1904, to limit prices to $1.00 at the Lehigh Valley, none of the early prices were as high as $1.00. In April 1905, a manufacturer issued "a schedule of prices on a basis of 85 cents in the Lehigh Valley" (Com. Ex. 3235 Y). On 4/10/10 there was a "base" at the Valley of $.73, and on 4/22/10 it was $.60 (Resp. Ex. 2609; Tr. 35879-91). In 1912 the "base" was as low as $.58 (Resp. Exs. 2609 Z33; Tr. 35886). At no time prior to the late fall of 1916 (when all costs and prices were rising) was the "base" as high as $1.00 (Resp. Exs. 2609; 2610; Tr. 35879, *et seq.*). Some manufacturers merely expressed hopefulness that the price would be on the basis of $1.00 at the Lehigh Valley (Com. Exs. 3235 Z1).

From the context, Harding's statement, quoted in the report, represented an expression of the fact that, except in times of a great shortage of cement, the market price of cement cannot be raised by any one company unless all

competing sellers follow its lead. The next speaker after Harding said: "We do not need any price agreements" (Com. Exs. 3235 Z63).

The recommendations of the A.A.P.C.M. concerning trade practices were never followed (Resp. Ex. 3788, at pp. 1508, *et seq.*; Tr. 23393-94; 23875-76; 31052-53). Respondents denied any agreements to follow such practices (Tr. 31052-53; 23876; 23393-94).

2. Exception is taken to the inferences that respondents followed practices or performed acts as a result of the meetings referred to in Paragraph 168 on the ground that such inferences are not supported by the evidence.

3. Exception is taken to the erroneous reporting of the resolution at the December 1904 meeting, on the ground that the resolution stated that manufacturers, in answering inquiries for prices, should confine their deliveries to April 1, 1905, and should quote a higher price after that date, and that it was the sense of the meeting that the price in April 1905 should not be less than $1.00 (Com. Ex. 3235 W).

"License Agreement Association"

Paragraphs 169-170

1. Exception is taken to Paragraphs 169 and 170 because the statements therein are based upon evidence not relating to any issues in this proceeding (See objections Tr. 20074-75; 20083-85; 35439-54; 35623-29). There has been no showing that the agreements relating to the Association of Licensed Cement Manufacturers in any manner influenced the policies or practices of any respondent or group of respondents subsequent to the dissolution of these agreements.

2. Exception is taken to the failure to report the following: The agreement constituting the "Association of Licensed Cement Manufacturers" and related license agreements referred to in these two paragraphs were dissolved on January 1, 1911 (Tr. 24034). These agreements came before the Supreme Court in the "old cement case" (Tr. 24033). (*Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588.)

The Hurry & Seaman patented device owned by the Atlas Company greatly reduced the cost of manufacture of cement (Tr. 24023). Several competing manufacturers, among them Alpha, began to use a similar process and eventually Atlas brought suit against the Alpha Company for infringement of the Hurry & Seaman patent by the Martins Creek Portland Cement Company which Alpha had purchased in 1902 (Tr. 24023-24). Later Lehigh, Vulcanite, Lawrence and American joined Alpha in defense of this suit (Tr. 24024).

After several years of bitter contest, the case was settled. Under the terms of the settlement Atlas transferred the Hurry & Seaman patent to a holding company called the North American Portland Cement Co. which paid Atlas an annual royalty of $200,000. All users of the patented process in turn paid royalties to the holding company (Tr. 24024).

About this time a court decision was handed down in the *Rubber Tire and Wheel* case (54 Fed. 358, C. C. A. 7th), which appeared to grant a holder of a patented process the right to control prices and terms of sale of materials manufactured under the patented process (Tr. 24024). Pursuant thereto licensees under the aforesaid agreement were provided with prices, terms and policies by which cement manufactured under the patented process was to be sold (Tr. 24024-25).

Meanwhile, the Sandusky Cement Company in Ohio attacked the validity of the Hurry & Seaman Patent. It obtained a favorable decision and the entire license agreement was abandoned and the North American holding company went out of existence (Tr. 24025).

Several manufacturers in the Northeast did not at any time become parties to the license agreement (Tr. 24025). Neither was it applied to all of the territory in which every member of the association sold cement (Tr. 27190-91).

The license agreement had no effect on the prices of those companies which were not a party to it, nor did it even have a substantial effect on the price policy of every member of the agreement (Tr. 24030).

The license agreement did not have any effect on the use of basing points which had already been used prior to

the agreement (Tr. 24031), nor did it change the existing discounts then being granted to dealers and distributors (Tr. 24031-32). Neither was the provision in the license agreements that all quotations were to be for periods not exceeding fifteen days a new provision, since there had always been a limitation on the acceptance time (Tr. 24033).

The aforesaid license agreements involved only a few corporations named as respondents in this proceeding. The following corporations are not the corporations of the same or similar names which are respondents in this proceeding: North American (Tr. 33739), Atlas (Tr. 13031-34), Alpha (Tr. 23012; Com. Ex. 3152); Pennsylvania (Com. Exs. 3135, 1187), Penn Allen (Com. Exs. 3135, 1187), Nazareth (Tr. 27956-57; Com. Ex. 3127), Edison (Tr. 35588-89; Com. Ex. 3114), and Whitehall (Tr. 28473; Com. Ex. 3164).

Furthermore, American, Dexter, Buckhorn, Catskill, Bath, Phoenix, and Northampton also are not respondents in this proceeding.

The only respondents in this proceeding involved in the aforesaid agreements are Lehigh, Vulcanite, Lawrence and Glens Falls.

"Other Organization Activities"

Paragraph 171

1. As to Paragraph 171, exception is taken to the erroneous statement that Duffield reported to the Portland Cement Association, on the grounds that he reported to the American Association of Portland Cement Manufacturers (Com. Exs. 3235 Z48).

2. Exception is taken to the failure to report the following: The reported quotation is the only evidence concerning acts in Michigan in 1909, and there is no proof that any such conspiracy was continued up to and during the period covered by the complaint (to wit, eight years last past).

3. Exception is taken to the inference that the supposed 1909 Michigan agreement was performed on the ground it is contrary to the evidence and to the failure to report the

following: Prices in Michigan have not been based on the Lehigh Valley for thirty years. Since June, 1912, there has been a "base" at the Wabash plant serving Michigan (Tr. 35885-88; Resp. Exs. 2609 Z33; 2610 A). Since April, 1914, there has been a "base" at Alpena, Michigan (Resp. Ex. 2610 A). Since the spring of 1914 there have been "bases" at Bellevlue and Newaygo, Michigan (Resp. Ex. 2610 A). For thirty years there have been bases practically as low as any Lehigh Valley base which were much closer to Michigan and which affected prices there, for example, Mitchell, Indiana in August, 1911 (Tr. 35884); New Castle, Pennsylvania, in April, 1912 (Tr. 35885; Resp. Ex. 2609); Manheim in 1912 (Tr. 35885-86; Resp. Ex. 2609); and Stroh, Indiana, since June, 1912 (Tr. 35885; Resp. Ex. 2609). See also Tr. 11178-79; 11020-21.

In 1910 there were only the following companies with plants in Michigan: Huron, Hecla, Michigan Alkali, Burt, Newaygo, Elk, Wyandotte (not the respondent), Peninsula, Wolverine, New Aetna, Omega, Peerless (not the respondent), Egyptian, New Bronson, Alpena (Resp. Ex. 3764). New plants were added as follows: Michigan in 1911; Alpha in 1920; Petoskey in 1921; New Egyptian in 1923; Aetna in 1923; Ford Motor Company in 1924; Michigan State in 1924; Peerless (the respondent) in 1936 (Resp. Exs. 3765; 2405; Tr. 34416-17).

The following companies discontinued operations or sold their Michigan plants to other companies between 1910 and 1920: Michigan Alkali, New Aetna; Alpena, Hecla; Elk; Peerless (not the respondent); New Bronson, Omega; Burt in 1920; Egyptian in 1927; Michigan in 1924; New Egyptian in 1931; Alpha in 1934; Michigan State Plant in 1935; Newaygo in 1936; Peninsula in 1934 (Resp. Exs. 2405; 2521; Tr. 13340-41; 40024-26). The present Wyandotte Portland Cement Company, then called Michigan Alkali Co., was incorporated October 4, 1924 (Com. Ex. 3131 B).

Only Huron and Wolverine had mills in the Michigan area from 1909 to date (Resp. Exs. 2405; 3764; 3765). Huron, Aetna, Petoskey, Consolidated, Peerless (new) were not members of the A.A.P.C.M. in 1910 or at any other time (Com. Ex. 3235). The P.C.A. has had no connection with prices (Tr. 33985; 29238; 37469-70; 31052-53).

Paragraph 172

1. Exception is taken to the failure to report the following in Paragraph 172: Beginning in 1912 the Portland Cement Association became active in promoting the use of Portland cement (Com. Ex. 3194). The Portland Cement Association has had nothing to do with marketing policies or with price (Tr. 37469-70; 29237-39; 33985-86; 31052-53).

The A.A.P.C.M. and the P.C.A. prior to 1920 did, from time to time, collect information concerning the practices of various cement companies. They sometimes sent out digests or statements of the best practices found in the industry. They never originated a new practice (Tr. 23872-74). Respondents denied that there ever was an agreement to abide by such practices (Tr. 23876; 31052-53). No attempt was ever made to enforce such practices. They were not followed and had no effect (Tr. 23876; 23392-94; 23875-76; 31052-53; Resp. Ex. 3788).

The report of the Committee on Trade Conditions of the American Association of Portland Cement Manufacturers and the report of the Trade Practice Committee of the Portland Cement Association constituted surveys of the practices followed by individual cement companies and no new practices were suggested (Tr. 23873-76; 31052-53).

The reports stated:

> "What follows in this pamphlet makes very evident the evils of the past and the reasons supporting each recommendation of the committees. Doubtless every manufacturer will desire to avail himself of the suggestions. Of course, no member of the Association is in any way obligated by the reports by the Association, to follow the recommendations. It is not at all a matter of mutual agreement, but solely a question as to whether the recommendations appeal to each member of the Association severally as the best thing for him and all concerned" (Com. Ex. 3192, p. 3).

Respondents testified that they did not agree to follow the trade practices to which reference was made in the reports (Tr. 31052-53; 23876). The inference that agreements were made to follow these reports is erroneous and not supported by the evidence. A survey made in 1922 and received in evidence in the *Old Cement* case (268 U. S. 588,

1925), shows that none of the reports was followed (Resp. Ex. 3788, pp. 1508-1648, and a summary at pp. 2690-93). Respondents testified that "they never became effective in the industry" (Tr. 31052) and they had no effect on individual companies. (Tr. 23875-76; 23393-94). These two reports were received in evidence in the *Old Cement* case (268 U. S. 588, 1925).

The activities of the Cement Manufacturers Protective Association were approved by the Supreme Court in 268 U. S. 588 (1925), the Court specifically reviewing the Association's activities concerning statistics, specific job contract reporting, freight rate books, credits and bag returns.

The facts concerning North American patent license agreements were introduced in the *Old Cement* case and were passed on in it. This agreement began in 1908 and was terminated in January, 1911 (Com. Ex. 3189 B, C). The North American license agreement was entered into in 1908 to settle a *bona fide* patent infringement suit pursuant to the rule in the *Rubber Tire and Wheel* case (154 Fed. 358, C. C. A. 7th). When the doctrine of this case was overruled by the courts in 1910 or 1911, the agreement was terminated (Tr. 24022-26; Com. Exs. 3196 B; 3189 B, C). There was no evidence of any connection between this North American license agreement and the American Association of Portland Cement Manufacturers, the Portland Cement Association, The Cement Manufacturers Protective Association or The Cement Institute. There was no connection between the Portland Cement Association and The Cement Institute (Tr. 48494-95).

2. Exception is taken to the implication that there is a connection between the names in Com. Ex. 3196 FF (a list of North American licensees) and the 1915 report of the Association of American Portland Cement Manufacturers on the ground that it is not supported by the evidence.

3. Exception is taken to the implication that Com. Ex. 3190 B contains a list of names as there are no names contained in that exhibit, and that Com. Ex. 3196 FF and Com. Ex. 3189 deal with the Portland Cement Association or the American Association of Portland Cement Manufacturers, on the ground that they deal only with the North American license agreement of 1908 to 1911.

Paragraph 173

1. Exception is taken to all of Paragraph 173 on the ground that it is not supported either by the references cited or other evidence and further exception is taken to the failure to report the following: There were no meetings of The Cement Institute between May 12, 1931 and June 10, 1933 (Com. Exs. 136-3 K; Resp. Exs. 125 A; 2155 A; Tr. 30866-77). After the organization meeting on August 20, 1929, there were held fourteen meetings of The Cement Institute, its trustees, or its divisions, the first being held on October 4, 1929 and the last on May 12, 1931. Matters dealt with at these meetings included expansion of the Institute and financing, elections of officers and of new members, the organization and discontinuance of services provided for in the Articles of Association, and application for a Federal Trade Commisson trade practice conference. At none of these meetings was there any discussion of the price, dealer or other policies, of members, or of plans for sharing business, nor were any agreements or understandings with respect thereto discussed or entered into (Resp. Exs. 2154 A, B; Com. Exs. 136 K-X, AA-WW, YY-GGG, KKK-LLL; 137 A-F, Q; Tr. 16913-18; 16964-70; 29158-59; 37219-21; 39588; 42318).

About 38 respondent companies were never members of the Institute prior to June, 1933 (For citations, see Paragraph 1, *supra*, Exception 5).

Since June 10, 1933, many meetings of the Institute, its trustees, divisions or committees have been held. With the exception of meetings held from June through December, 1933, none of these were the occasion for any discussion of price, dealer or other policies, or for the formulation of any agreements with respect thereto. Meetings between June and December of 1933 were concerned with the drafting of an NRA Code of Fair Competition pursuant to the provisions of N.I.R.A. Since the Act itself required the presentation for approval by the President of a Code under which the industry must operate, the work of drafting such a Code could not proceed without discussion concerning its preparation and content by those to be affected by it (Resp. Exs. 1370 A-D; 1823 A-D; 2155 A-D; 2173 A-E;

2174 A-D; 2177 A-B; Com. Exs. 547-3W-3Z; 591 A-L; 596 A-601; 603 A-D; 605 A; 628 D; 634 A-M; 636 A-D; 637 A-EE; 797 W-Z; 828-6T-7H; Tr. 16913-18; 16964-70; 27550-52; 27556-58; 29158-59; 30170-71; 30715-16; 32227; 33915; 33920-22; 36976; 37219-21; 37730; 39140-41; 39588; 42318).

The NRA Cement Code approved by President Roosevelt on November 27, 1933, on the recommendation of NRA contained a provision whereby the Institute Board of Trustees was to prepare a plan for allocation of available business among members of the cement industry. Between December of 1933 and April of 1935, five different committees tried unsuccessfully to draft some plan which would be suitable to all members of the industry. Discussion of the work of these various committees took place at several meetings of the industry and of the Institute during this period. No plan acceptable to all members of the industry was ever drafted and no plan or agreement for the allocation of business or for the sharing of business ever went into effect during the NRA Code period or any period before or since (Com. Exs. 550 B, C; 597 A-D; 598 E-F; 613 B; 614 D; 615 C-E; 616 C-D; 617 E; 618 E-H; 619 C; 620 B; 621 E; 629 A; 636 A-D; 637 H-i, L-O, T, X, BB; 695; Tr. 17043-44; 17091-92; 26249-54; 26264-70; 27390-95; 28617-19; 29206-08; 29484-86; 30754; 33789-90; 36470-71; 37191-93; 39036-37; 40098; 31540-41; 42220-21; for other citations, see Paragraph 159, *supra*).

2. Exception is taken to the statement in the first sentence of Paragraph 173 on the ground it is not supported by the evidence cited or other evidence. It is apparent from the face of Com. Exs. 637 A-F that the discussion that took place at the meeting represented thereby concerned provisions of a proposed NRA Cement Code being drafted pursuant to N.I.R.A.

The discussion that took place at the meeting represented by Com. Exs. 637 G-J concerned one of the proposed plans for sharing available business drafted pursuant to the NRA Cement Code. The plan was rejected by those present.

The discussion that took place at the meeting represented by Com. Exs. 637 K-Q concerned the possibility of

drafting a new plan for sharing available business under the NRA Cement Code. It is evident from the minutes of the meetings represented by Com. Exs. 637 B-U and V-Y, that the committee appointed at the first mentioned meeting accomplished nothing. The Trial Examiner fails to cite Com. Ex. 637 BB, minutes of a meeting of April 25, 1935, which indicates that the committee referred to at the above three meetings was discharged after having accomplished nothing and fails to report that thereafter there has been no mention of any plan for sharing available business.

It is apparent from all of the exhibits cited by the Trial Examiner and the additional exhibits referred to in the previous paragraph that at none of the meetings represented thereby was there any discussion of price, dealer or other policies and that none of them gave rise to any agreement.

3. Exception is taken to the statement in Paragraph 173 that the meetings of March 1 and September 12, 1934 were held at Baltimore, Maryland. It is apparent from the face of Com. Exs. 637 G-Q, that both of the meetings referred to therein were held in New York City.

4. Exception is taken to any implication in Paragraph 173 that the Committee on Statistics was in any way concerned with matters of price, dealer or other policy, and to the failure of the Trial Examiner to report the following:

The Committee on Statistics was concerned with the form of statistical reporting and not with the statistics reported. Cement companies reported shipment statistics to three bodies, the Portland Cement Association, The Cement Institute and the Bureau of Mines. Reports to the Bureau of Mines were for statistical purposes and those to the Institute and the P.C.A., for the purpose of assessing dues. Each body supplied a different type of form on which industry members were to report the information. The Committee was appointed to straighten out this situation and thus save the companies reporting considerable time and expense (Tr. 4428-29; 27417-18; 33790-91). The Committee was appointed on November 7, 1935 and discharged on February 27, 1936. It had nothing to do with allocation of business and never functioned outside of Bu-

reau of Mines Districts 1 and 2 (Resp. Exs. 1370 A-d; Com. Exs. 637 CC-EE; Tr. 4437-38; 27418-20; 33791).

Exception is taken to the implication that the Cement Information Bureau of The Cement Institute had anything to do with any of the matters reported in the first three sentences of Paragraph 173 on the ground it is not supported by the evidence.

Paragraph 174

1. Exception is taken for failure to report the following in Paragraph 174:

The Pacific Coast Cement Institute was never affiliated or in any way connected with The Cement Institute and the Institute refused to supply the Pacific Coast Cement Institute with its services (Com. Exs. 638-2A, 2B; Tr. 9168; 9173-76).

Northwestern is not a member of the Pacific Coast Institute. Pacific joined in June, 1937. Santa Cruz joined after the complaint was served. Cowell and Olympic listed in the Report as members, are not respondents and Cowell is not a member (Tr. 9151).

2. Exception is taken to the statement in Paragraph 174 that the Pacific Coast Institute "figures and disseminates land grant rates from information received from railroads" because it is contrary to the evidence. Exception is taken to the failure to report that the Pacific Coast Institute acted as a mere conduit in obtaining land grant rates from railroads and passed them on in precisely the same form in which they were received. Only four respondents (California, Riverside, Southwestern and Monolith) participated in this land grant service. (Tr. 9137-38; 9187-93; 9236-44; 8650-51; 8669; Com. Exs. 564 B to 3 U). Exception is further taken to the failure to report that these four companies did not use the "control clause" or submit identical bids during the period of their participation in the land grant service of the Pacific Coast Institute (See exceptions to Paragraphs 130-138, *supra*).

3. Com. Exs. 564-3R, 3T and 3U cited in Paragraph 174 do not support the statements for which they are cited. Tr. 9133-45 and Tr. 9187-91 establish the contrary of the statements for which they are cited (See Tr. 9137-38; 9189 and 9192).

Paragraph 175

1. As to Paragraph 175 exception is taken to the inference that any company joined or rejoined the P.C.A. because of any understanding relative to prices, on the ground that each joined or rejoined because it was then able and willing to pay a share of the promotion expenses of the P.C.A. if others paid. Further exception is taken to the statement that "some competing companies resigned" because they were "dissatisfied with competitive situations such as existed at Cape Girardeau", on the ground that no company resigned because of any competitive practices. Some could not afford to pay dues and others would not pay dues unless all companies paid. By the nature of its activities P.C.A. benefitted a producer equally whether it was a member or not (Tr. 37210; 37246-48; 46770-71; Com. Ex. 2978).

Further exception is taken to the failure to report the following: In 1931 and in the spring of 1932, cement prices were ruinously low (Tr. 24591-92; 25626-27; 19527; 26925; 26919-23; 34651; 39966-67; 37294; 37304; 37384-86; 19545; 35293-94; Resp. Exs. 61 A-C). In December, 1931, Missouri issued quotations advancing prices 30 cents per barrel in the vicinity of its Sugar Creek mill (Tr. 26919-23; Com. Exs. 2156-16Z; 3176; 2620).

Lehigh and others did not follow Missouri's increase and the increase never became effective. No cement was sold at the higher price (Tr. 26919-23; Com. Exs. 3176; 2156). The downward price trend continued in 1932 (May 19, 1932) around LaSalle, Illinois (Resp. Ex. 830; Com. Exs. 1121 A; 1114; 975-19o; 14 W; 2156; Tr. 33394; Resp. Ex. 2799). A further price reduction was made in eastern Missouri in early June, 1932 (Resp. Ex. 2352; Tr. 32754-59; Com. Ex. 1121; Resp. Exs. 819; 830; 859; 902; 903; 930; 931; 2798; Com. Exs. 2387; 2156; 3325). This was followed

by a further price reduction in the middle of June, 1932, around St. Louis (Com. Exs. 975-3Y; 3325; 1114; 1117; 2387; 2156).

At the same time that prices were going down in eastern Missouri and northwestern Illinois, price increases were announced in western Missouri and Kansas late in May, 1932. Lehigh initiated the advance because prices were lower in that area than anywhere else in the country. Competitors followed it (Resp. Ex. 2500; Tr. 26919-23; Com. Exs. 1121-23; 3141; 967-14Y; 2156; Resp. Ex. 2487). Lehigh first published the advance by sending out quotations in the area around its Iola mill which showed an increase of about 25 cents per barrel (Tr. 26920-21; Com. Exs. 1121 B-C; 2156; Resp. Exs. 2500; 2487). Missouri, after losing about $1,000,000, raised its prices around Kansas City early in June, 1932 (Tr. 37304; 37294; Com. Ex. 1114 A; Resp. Ex. 2500; Com. Exs. 1121 B, D). Marquette had by July 1, 1932 sold all the cement that it could possibly manufacture and deliver during 1932 and 1933 at a figure which showed a loss (Tr. 39049; 39996-98; 40004; Resp. Ex. 85).

Marquette issued quotations dated July 16, 1932, advancing its price on current orders so as to net $1.25 on sales to any of its customers (Com. Exs. 2272; 2278; 2268-71; 2273; 2274-77; 1117-B; Resp. Ex. 2501-B). In view of the provision in Marquette's contracts protecting purchasers at the lower prices, Marquette only received the benefit of the advance on a small volume of current orders. Competitors picked up Marquette's quotations in the field (Com. Ex. 2299; Resp. Ex. 2501). Some other companies not only followed Marquette around Marquette's mill, but also advanced their own prices around their own mills by various amounts which were less than Marquette's 40 cent advance (Com. Exs. 2387; 1117; 1121 i; Resp. Exs. 859; 2798; 2799; 3379; Tr. 33395; 33445; 26926; 37304-06). For example, Universal-Atlas advanced its prices 15 cents around Hannibal and Buffington (Resp. Exs. 2487 L; 2501) and Missouri 30 cents around St. Louis (Com. Ex. 1114 A; Resp. Ex. 2501). Competitors were glad to follow changes upward because of their existing losses from the succesive

reductions (Tr. 24588-92; 25626-27; 26925-26; 34930; 37294; 37306; 37384-86). Marquette's prices were the only prices which advanced as much as 40 cents per barrel (Resp. Exs. 2501; 2487; Com. Ex. 1114 A).

An illustration of how this increase operated is afforded by Terre Haute, Indiana. On January 31, 1932, the market price at Terre Haute was $1.31 bulk or $1.81 cloth reflecting $1.50 cloth Limedale plus 31 cents freight (Com. Exs. 1863; 2276). On July 16, 1932, Marquette quoted $2.16 cloth reflecting $1.65 cloth La Salle and disregarded $1.50 cloth Limedale (Com. Ex. 2276). On July 23, 1932, Limedale advanced 15 cents (Resp. Ex. 2501; Com. Ex. 2298). This made the price in cloth $1.96 at Terre Haute. (This was lower than Marquette's advance.) On December 13, 1932, Limedale advanced 10 cents (Resp. Ex. 2504). This made the price in cloth $2.06 at Terre Haute (This was still lower than Marquette's price). Quotations show that on December 22, 1932 the market price at Terre Haute was $1.61 bulk or $2.06 cloth, reflecting $1.75 cloth Limedale (Com. Exs. 1856, 2605 E; 2764; 2812; 2154; 2158). Respondents denied that the June-July, 1932 increase in prices was the result of any agreement (Tr. 24590; 37305-06; 47146-47; 19546; 33986). Marquette joined the P.C.A. on July 12, 1932, but agreed to pay dues starting as of July 1, 1932 (Com. Ex. 3005 E). P.C.A. dues were reduced in July, 1932 (Tr. 40101; 40619; 40431-32). The Assistant General Manager of P.C.A. knew nothing of July, 1932, price increases (Tr. 29237-39).

Paragraph 176

1. As to Paragraph 176, exception is taken to the failure to report that there has never been any connection between the Portland Cement Association and The Cement Institute (Tr. 48494-95); and that many of the companies listed as members of the Portland Cement Association are non-respondents; for example, Allentown, Cowell, Louisville, Olympic, Republic and San Antonio.

2. Exception is also taken to the reporting of the Portland Cement Association membership since the Portland Cement Association is not a respondent and is not alleged to be a co-conspirator.

Paragraph 177

1. Exception is taken to the failure to report the evidence concerning the price increases in June and July 1932 which is set forth in the exceptions to Paragraph 175.

2. Exception is also taken to the inference that "the price of cement in the Midwest rose 40 cents per barrel", because an increase of 40 cents was effective only in the territory surrounding the two Marquette mills. Increases at other points were considerably less, and some mills did not advance their price bases (Resp. Ex. 2501) (*supra*. Par. 175).

3. Exception is taken to the first sentence of Paragraph 177 for all of the reasons set forth in the exceptions to Paragraphs 175 and 176.

Republic, Longhorn and Standard Lime and Stone are not respondents and the Bessemer and Peerless referred to are not the respondents Bessemer and Peerless.

4. Exception is taken to the second and last sentences of Paragraph 177, because they are not supported by the evidence.

"Various Cooperative Activities"

Paragraph 178

1. Exception is taken to Paragraph 178 in so far as it fails to report the following:

There was no evidence that the alleged agreement between Colorado and Lehigh was ever carried out.

There is no evidence (and none suggested) that any other respondent participated in such agreement, if it existed.

"International" referred to had no connection or relation then or ever to International Cement Corporation or its successor, the respondent Lone Star (Tr. 25485-86; 34668; 47654-56).

The respondent Arkansas was not in existence in 1915 and was not organized until 1927. (Ans. Par. I; Com. Exs. 3176 J-N; Tr. 46565). The respondent Nebraska was not

organized until 1936; its predecessor company was in receivership from 1915 to 1917 and had no affiliation with Mr. Boettcher or *Ideal* in 1915 or for several years thereafter (Tr. 41959-60).

Lehigh did not acquire the Iola, Kansas mill until late 1916 (Tr. 26583).

2. Exception is taken to the unsupported conclusion that "back in 1930-31 conferences and correspondence among competitors on price matters were not unusual". The evidence shows that prices have not been the subject of consultation or conference among competitors (Tr. 42018; 23367; 23375-76; 29582-83; 29571; 23847; 23363-64; 47147; 36043; 29544; 30039-40; 32825-26; 32828; 34248; 30792; 30809; 30593; 27866; 27720; 40049; 40060; 37305-06; 37329; 37795; 36490; 28761-62; 29159; 47661-62; 8903; 37522-23; 39594; 39632; 34800-01; 34830; 33666). Exception is further taken to the failure to report that Mr. Hoenig testified that the telephone call from Rockwell was an isolated occurrence; that they did not "check" prices; that no arrangement was discussed concerning prices; and that Rockwell is dead (Tr. 42018-20).

3. Exception is taken to the failure to report in Paragraph 178 that Com. Ex. 2238 related to white cement, a product manufactured by the respondents Universal-Atlas and Medusa, and marketed through agency contracts with Colorado and others; that it was a perfectly proper communication between agent and principal; that it had nothing to do with the marketing of the product mentioned in the complaint—to wit, standard (grey) Portland cement; and it was conceded that evidence regarding white cement and other specialty products were not to be considered part of the case (Tr. 13922-23; 40117-19).

4. Exception is taken to the failure to report, regarding the reference to Com. Ex. 2239 in Paragraph 178, that the author of the letter testified that his sole source for the statement quoted in the report was the reports from his salesmen, and customers who dealt with competitors; and that he did not on this or any other occasion obtain information of this character from competitors (Tr. 42063-64).

5. Exception is taken to the failure to report in Paragraph 178 regarding the reference to settlement of "the price situation" at a meeting on May 12, 1931 that there is no evidence indicating that the matter was discussed at a meeting on May 12 or at any other meeting or that any action was taken thereafter. Exception is further taken to the failure to report that a base of $1.00 at Superior, Nebraska, continued from April 1931 through June 1932 (Com. Exs. 1125; 3176 H; 976 5F) and that the low level of prices throughout the area in question persisted for more than a year subsequent to May 1931 (Com. Exs. 1114; 2156; 2620; 3167 N; 976 4J).

Paragraph 179

1. Exception is taken to the assertion in Paragraph 179 that the Ada base was $1.75 stripped in May 1932, since the record shows it has never been as high as $1.75 stripped since 1931 (Com. Ex. 1125; Resp. Ex. 2506). Exception is further taken to the implication that the base at Ada, Oklahoma was increased by understanding, agreement or collusion, or as a result of the correspondence of Mr. Boettcher which is cited, and to the failure to report that the base at Ada, Oklahoma dropped to $1.50 in February 1931; dropped further to $1.00 in April 1931, and remained at that low figure until it was increased to $1.25 late in May 1932 (Com. Exs. 3176 H; 3182; Resp. Ex. 2492; Com. Exs. 1125; 3150; 3176 H; 2620; 1121 B; 2387).

Paragraph 180

1. Exception is taken to the failure in Paragraph 180 to report that Superior, Inc. has continually throughout its existence sold f.o.b. mill to the U. S. Government (Tr. 8435); that the Northwestern Company began operations by selling to commercial customers f.o.b. destination in 1928; that Superior, in order to meet this competition and simplify its accounting did likewise; and, that dealers and contractors alike were interested in and preferred destination prices (Tr. 8438-39; 8444). Exception is further taken

to the failure to report that the incident referred to in Paragraph 180 was purely local, and did not even affect the market at nearby Portland, Oregon (Tr. 8509) and that the trend of prices in the Northwest has been gradually downward since 1931 (Tr. 8513-14).

2. Exception is taken to the statement in Paragraph 180 "other mills joined in this advance" in so far as it implies any concerted or joint action; there being no evidence to support such implication. Exception is taken further to the failure to report that the evidence is to the contrary (Tr. 8435; 8528; 8578).

Paragraph 181

1. Exception is taken to the entire statement in Paragraph 181 regarding the change in the base at Cleveland, Ohio in January 1936, on the ground that the implication of concerted and collusive action suggested thereby is not supported by the evidence.

2. Exception is taken further for the failure correctly to report the facts concerning this price change as shown by the evidence as follows:

The increase in the Cleveland, Ohio base in January 1936 was independently initiated by the Lehigh Company which since 1929 had owned and operated a grinding and packing plant at Cleveland. The Lehigh district offices at Buffalo and Pittsburgh, which had charge of the area to be affected by the increased prices, were notified by the Lehigh main office during the Christmas holidays that an increase would be attempted around the first of January. Such advance notice to district offices was unusual but occurred at that time because of the anticipated absence of the district managers from their offices for the year-end holidays (Tr. 26881; 26929-30). The information concerning Lehigh's anticipated advance in some way "leaked out" to the trade so that by December 31st Lehigh's customers in the Cleveland market knew of it. These dealers informed salesmen of competing companies who, in turn, reported the information to their respective home offices (Tr. 26930; Resp. Ex. 2864 A; Tr. 37698; 37988-89).

Some of Lehigh's competitors gave specific instructions to their salesmen to note particularly any action taken or changes which might be inaugurated by Lehigh (Com. Exs. 1929; 1930).

The information which Lehigh's competitors learned from their customers and salesmen apparently indicated erroneously that Lehigh's advance in price would be effective January 7, 1936, and one respondent, acting on these rumors, issued new price quotations effective January 7, 1936 (Com. Ex. 1929; Resp. Exs. 2864 B-E; Tr. 37804).

The Lehigh Company announcements dated January 3rd, were mailed to Lehigh's customers on January 2nd, to become effective January 8th. These quotations were in the hands of Lehigh's dealer customers on January 3rd and were picked up by salesmen of competitors on that date (Tr. 37698; 26929; Com. Exs. 1930; 2380; 2381; Resp. Exs. 2864 C, E, F, J).

Competitors followed the Lehigh increase (Resp. Ex. 2864 D; Tr. 37698; Resp. Ex. 3545; Tr. 33423).

The evidence on behalf of each of the respondents selling in the Cleveland area, namely, Huron, Medusa, Lehigh, Standard, Diamond, Bessemer, Southwestern and Pittsburgh Plate Glass, was to the effect that each of these respondents acted independently with respect to this price change and had no understanding, agreement or combination with any competitor with respect to it (Tr. 26930-31; 40048-49; 40056; 28769; 28851-52; 32098; 32350; 11392-93; 48105; 48106; 47758; 37804).

3. Exception is taken to the statement in Paragraph 181 that North American informed competitors of its price changes, on the ground that it is not supported by the evidence. Exception is further taken to the failure to report that the witness Porter, at the pages cited in the report (Tr. 34038-43) testified that it was *not* the policy or practice of North American to notify its competitors in advance of making a price change and that competitors have no way of knowing what changes in price North American will make or has made, until they find North American's quotations in the hands of its customers.

4. Exception is further taken to the failure to report in this connection that on a single occasion in 1936 one respondent company after receiving reports from its salesmen from the Baltimore area to the effect that price quotations of North American, effective immediately, had been received by the customers at a number of points, asked North American for a list of the prices they had quoted in that area. North American granted this request and a list of such prices was delivered to the inquiring company the following day (Resp. Exs. 720 A-B; Tr. 23840-43).

Paragraph 182

1. Exception is taken to the implication in Paragraph 182 that all respondents on the West Coast send price lists to or receive them from competitors, there being no evidence to support such implication and none cited; and to the failure to report that the evidence cited (Tr. 8474), shows that Superior, Inc., Northwestern or Lehigh have never sent price lists to or received any from competitors.

2. Exception is taken to the implication in Paragraph 182 that Santa Cruz sends its price lists to all of its competitors, since the evidence cited (Tr. 8434-35), shows it has not and does not send such lists to Superior, Inc., Northwestern or Lehigh in Washington. Exception is further taken to the failure to report that Santa Cruz has no competitors east of the Rocky Mountains.

3. Exception is taken to the statements in Paragraph 182 that Santa Cruz receives price lists from Calaveras, Oregon and Beaver, since the evidence cited shows the contrary (Tr. 8635-37).

4. Exception is taken to the statement in Paragraph 182 that Santa Cruz "follows" competitors' price lists and to the implication that there is a particular sales "territory" allotted to each or any respondents on the West Coast, there being no evidence to support the statement or the implication. Exception is further taken to the failure to report that all companies in the area sell at prices other than those shown on the price lists; that prices lower than those shown on the price lists are invariably given to the United States Government; that regardless of price

lists each company tries to meet the lowest known price at each market and that since January 1930 no prices in Southern California relate to any base plus freight (Tr. 9039; 9324-25; 8985-87; 8995-96; 8713-14; 8953-55; 8637-38; 8717-18; 8761-62; 8919-20; 9067-74; 9083-84; 42460; 42870-74).

5. Exception is taken to the inference created by Paragraph 182 that there is some regular practice or policy observed or adhered to by respondents on the West Coast with respect to the issuance or exchange of price lists, on the ground that the evidence is directly to the contrary (see citations to No. 4, above) and for the failure to report as follows: California has not issued a price list since 1935 (Tr. 9323); Calaveras has only published price lists on two or three occasions during its existence (Tr. 8692-93); Yosemite has issued lists "sometimes" (Tr. 8737-38); Monolith has not issued a price list since 1936 (Tr. 8905); and only two respondents were issuing price lists during the two or three years preceding the date of the complaint (Tr. 8967-68).

Paragraph 183

1. Exception is taken to the quotation in Paragraph 183 that Southwestern takes "the other fellow's price in all cases", since it is not the language of the witness but the language of the Trial Examiner (Tr. 8939) and did not refer to "all cases" as implied, but to a particular type of situation (Tr. 8937-39). Exception is further taken to the failure to report that Southwestern meets the market prices it finds and could not sell cement if it tried to charge a higher price (Tr. 8939; 8954; 8956; 8903; 8909; 38944; 29035-36).

2. Exception is taken to the implication in Paragraph 183 that Riverside in any sense sets the prices in Southern California, because such action was specifically denied by the witness, whose testimony is cited (Tr. 8952-53).

3. Exception is taken to the statement in Paragraph 183 that "the multiple basing point system is in use" on the Pacific Coast on the ground it is not supported by the evidence and on other grounds heretofore stated (see

exceptions to Paragraphs 88-92). Exception is further taken to the failure to report that the testimony on behalf of Pacific Coast respondents denied the use of any multiple basing point system (Tr. 8939; 8959; 9082-83; 42879; 42448; 42708).

4. Exception is taken to the assertion in Paragraph 183 that "terms are uniform" if intended to imply that the terms of all respondents on the Pacific Coast are uniform, there being no evidence to support such an implication and none is cited; and exception is further taken to the failure to report that Yosemite, to which the citation refers, does not come into competition with most of the West Coast respondents (Tr. 42844).

5. Exception is taken to the statement that "freight rate books are of no use where arbitrary prices prevail" since it is not supported by the evidence and the evidence cited has nothing to do with respondents on the Pacific Coast. Exception is further taken to the failure to report that the evidence shows freight rate compilations are used to determine a company's mill nets on sales regardless of the manner in which prices are quoted and for determining among other things whether prices of competitors do or do not have a pattern (See Exception No. 1 to Paragraph 117). Exception is further taken to the failure to report that Cement Institute freight rate books have never been compiled for or used by West Coast members (See Exception No. 4 to Paragraph 115).

6. Exception is taken to the unwarranted conclusion in Paragraph 183 that "agreements were involved", on the ground that the evidence is to the contrary (Resp. Ex. 818; Tr. 25045-48; 27049-54; Resp. Ex. 1353).

7. Exception is taken to the failure to report the testimony that J. B. John, in discussing the price in Cleveland with an official of his company, did not suggest at any time that the Cleveland price should be based in Buffington (Tr. 40153-54).

8. Exception is taken to the last sub-paragraph of Paragraph 183 in its entirety because many of the citations

accompanying it do not support any part of the statements made therein and the remaining citations standing alone or in conjunction with other portions of the record not cited support only in part the statements in this sub-paragraph. The citations which are obviously misplaced are: Tr. 657-59; 18830-39; 36954; 37998-99; 41154 and 41625-28.

9. Exception is taken to the statement "from 1931-1933, numerous meetings and conferences to regulate or suppress trucking were held at various times" because it is not supported by the citations accompanying it or other evidence.

10. Exception is taken to the failure to identify "meetings" and "conferences" with references to the record and to specify the circumstances relating thereto and the respondents which were represented thereat.

11. Exception is taken to the statement that "Some of those included meetings of railroad officials with representatives of dealer associations, the President of The Cement Institute and others" because of the implication that the President of the institute attended such meetings as a representative of the Institute and for the failure to report that the Institute was in no way connected with any such meetings; that the president attended only in response to unsolicited invitation of a dealer and that no other person in the cement industry attended the meetings (Tr. 30982-83; 30991; 31068; 31025-26; Com. Exs. 1471; 1475; 1479; 1488 and 1489).

12. Exception is taken to the implication that some respondent or respondents were parties to understandings which restricted or prevented deliveries of cement to trucks on the ground that it is contrary to the evidence (See exceptions to Paragraphs 120-122, *supra*).

"The Cree Incident"

Paragraphs 184-187

1. As to Paragraphs 184 to 187, inclusive, exception is taken for failure to report on any of the evidence introduced by the respondents concerning the alleged Cree incident, or even to report the testimony of Commission

witnesses other than Cree and Miss Fowley (See exceptions to Paragraph 7).

2. Exception is taken to the failure to report the evidence set forth in the exceptions to Paragraph 7.

3. Exception is taken for failure to report the following: Aetna had two plants located in Michigan. The Company was owned by a few persons residing in Boston, Massachusetts. The Company president, F. R. Johnson, and most of the directors were located there (Tr. 29416-17). F. R. Johnson, the directors, and the stockholders were not familiar with the cement business (Tr. 29416-19).

From 1924 to 1929 a large tonnage of cement was shipped by all cement companies (Com. Ex. 2895). Aetna made a profit and the Boston owners paid no attention to the business affairs of the company (Tr. 990).

During the depression, Aetna's business fell off substantially from over 83% capacity in 1929 to 35.5% in 1933 (Com. Ex. 2895). Aetna began to lose money and continued to do so up to July 1936. At that time the losses exceeded $700,000. The Board of Directors by vote authorized the discharge of the two employees in charge of the actual operations in July 1936—Lingeman and Cree (Tr. 987; 990; 1006; 1034; 1067; 1074; 29464).

After the enactment of the National Industrial Recovery Act early in 1933 Johnson attended some meetings at which provisions for an NRA Cement Code were discussed. Many of these national or local code drafting meetings were attended by Cree and Lingeman (Tr. 982; 38782; 38826).

Beginning in June 1933, Johnson had more direct contact with Cree and Lingeman. With the loss of some $700,000, Johnson became curious about his employee's effectiveness as business men. He took every opportunity to learn what he could about the cement business by visiting his plants in Michigan, attending Code meetings, Institute meetings and P.C.A. meeting (Tr. 982; 38826; 38782).

During the time when the NRA Cement Code was in effect, Johnson tried to get his employees to live up to the Code. Several complaints were filed with NRA charging that Aetna was selling at prices that varied from those which had been filed or were otherwise effective under the

NRA Cement Code (Resp. Exs. 2426; 2636 D; 2028; 2029; Com. Ex. 1016; Tr. 982; 38782; 3882).

In December 1935 Johnson attempted to discipline his employees Cree and Lingeman by reading to them a statement of Aetna's policy. This took place before a small group of competitors. These competitors testified that they were invited by Johnson to step into a room for a moment and that they were surprised by his procedure. They further denied that any agreement was entered into, or that any discussion was held (Tr. 34402-03; 34499-500; 34403; 34405).

All during the years 1932 to 1937, when the so-called "Cree incident" was supposed to be going on, prices in Michigan were lower than anywhere else in the country (Tr. 30056-57; 35906; 6338; 35908-12). After Cree was discharged, prices in Michigan dropped even further. For example, in Detroit they fell from $1.71 per barrel to $1.70; to $1.60, to $1.50, and finally to $1.38 (Resp. Exs. 3554, 3561).

Cree's and Lingeman's successor, Calvin, testified concerning the bad condition of the company when he took over (Tr. 29932-40; 29442-44). The Examiner curtailed the proof on this matter and excluded many corroborative documents as being irrelevant (Tr. 29459-60; 30198-204).

Under Calvin, Aetna has employed the following practices: (a) It has allowed trucking (Tr. 30128) (b) it uses a distributor in Wisconsin (Tr. 30022-23); (c) it has closed those warehouses which were uneconomical. Warehouses were considered uneconomical where the cost of trucking direct from the mill to the job was less than shipping by water to a warehouse and from warehouse to point of use by truck (Tr. 29959-60; 29985-87; Resp. Ex. 1971); (d) Aetna has made special prices below the current openly quoted market prices (Tr. 30173); (e) Aetna has substantially increased the number of its dealer accounts (Tr. 30012-13); (f) it has increased its volume of business (Tr. 30012-13); (g) Aetna has made sales f.o.b. mill (Tr. 30101; Resp. Exs. 2023; 2024); (h) it bid on the so-called Good Friday invitation an f.o.b. mill price for use anywhere at the United States Government's option (Tr. 30101; Resp.

Exs. 2023; 2024); (i) Aetna continued to sell to the Indiana Farm Bureau and at more points than Cree (Tr. 30156; see also exceptions to Par. 7).

F. R. Johnson died in July, 1939; O. J. Lingeman died in September, 1938 (Tr. 30015; 29417; Resp. Ex. 3753; Tr. 47974).

4. Exception is taken to the implication that Aetna's policies were the result of agreements among its competitors on the ground that no such implication is supported by the evidence.

5. Exception is taken to the failure to report that Cree and Miss Fowley are disgruntled ex-employees and that each of them has been vindictive as a result of being discharged.

6. Exception is taken to the failure to report that the exhibits Com. Exs. 20 a-c and 22 B refer to meetings concerning the drafting of the NRA Cement Code (Tr. 982; 38826; 38782).

7. As to Paragraph 184, exception is taken for the failure to report that Aetna's business fell off steadily during the depression, and fell off more than that of some competitors (Com. Ex. 2985).

8. Exception is taken to the statement that Aetna produced 70 per cent of capacity while others produced 20 per cent to 24 per cent on the ground that the evidence shows that during the nine-year period from 1925 to 1933 Aetna operated at 65.8 per cent of capacity, Huron at 71 per cent, and Petoskey at 64.5 per cent. The annual ratios of productions to capacity were:

	1928	*1929*	*1930*	*1931*	*1932*	*1933*	*1925-23*
Aetna	77.5	83.	62.5	59.3	50.7	35.5	65.8
Huron	98.9	93.4	81.7	54.4	37.7	24.2	71.
Petoskey	92.2	83.2	64.4	59.	37.3	28.5	64.5
Ford	74.7	83.	86.5	X.	X	X	

(Com. Ex. 2895).

9. Exception is taken to the statement that there was friction between Cree, Lingeman and competitors on the

ground that it is not supported by the evidence. The evidence is that there were disagreements only as to provisions to be included in the NRA Cement Code and the interpretation of Code provisions (Tr. 38826; 38782; 982).

10. Exception is taken to the statement that Cree was traffic and advertising manager on the ground that Aetna never had such positions.

11. Exception is taken to all of the statements in Paragraph 184 on the ground that none of them is supported by the evidence.

12. As to Paragraph 185, exception is taken to the failure to report the following:

Each cement company tries to make its services superior to those of its competitors (Tr. 41623-24; 41903-04; 26051). Proof on this was curtailed by the Examiner (Tr. 26053; 39437-40; 41624-25).

Competitors have often bid below Aetna and made special prices (Tr. 30173; 40063-64; 40520; 34185-86; 34471; 38752-54; 34357; 34360; 34364-65; 34382; 34464-66; 34487; 1353-54; 11343-44; 35916).

All meetings except the one referred to in Paragraph 186 were connected with the drafting of the NRA Cement Code, or its interpretation and operation (Tr. 982; 38826; 38782).

Other cement companies sold cement to the Indiana Farm Bureau in 1935 and 1936; and Aetna continued to sell to the Bureau after Cree's discharge at all points where Cree sold to them and also at additional points (Tr. 30156-57; Resp. Exs. 3117 A, B).

For respondents' exceptions concerning the base at Bay City see exceptions to Paragraph 106, *supra*.

13. Exception is taken to the implication that Aetna sold to many dealers "not recognized" by competitors on the ground that the Report cites only Aetna's sales to the Indiana Farm Bureau and other respondents made sales to it (Tr. 30156-57; Resp. Exs. 3117 A, B).

14. Exception is taken to the statement that Cree gave customers the benefit of economies on the ground that there

is no evidence of what economies were effected or passed on to customers.

15. Exception is taken to the statement that Cree did not always conform to price patterns on the ground that the evidence shows his quoted prices were usually identical with competitors, and exception is taken to the implication that there was an understanding that prices should conform to a pattern on the ground it is not supported by the evidence (Com. Exs. 1857; 1858; 1856).

16. As to Paragraph 186 exception is taken to the failure to report the following:

That the letter containing the phrase "play the game 100%" is dated in October, 1933 and was dealing with the NRA Cement Code (Tr. 982).

The full facts concerning the meeting in December, 1935, are set forth in the exceptions to Paragraph 56.

All the meetings listed in Paragraph 186 took place in connection with the preparation or administration of the NRA Cement Code except the December 1935 meeting (Tr. 982; 38826; 38782).

17. As to Paragraph 187 exception is taken for failure to report that as an executive of Aetna, Cree was a failure; that Cree only contacted two cement companies for jobs; that Calvin denied saying, "I know damn well he won't" (29940-42); that Respondents denied any agreement not to hire Cree (Tr. 29940-42; 34404); and that the committee referred to in Com. Ex. 24 was an NRA Code Committee which never met (Tr. 30169-70; 30388-89).

18. Exception is taken to the statement that Aetna had numerous agreements on the ground that it is not supported by credible evidence.

19. Exception is taken to the statement that Johnson said Cree's job depended on cooperation with competitors and to the statement that a different attitude towards competitors came with Calvin's appointment on the ground that they are not supported by the evidence.

20. Exception is taken to the implication that the Institute was "identified" with any of Cree's transactions on the ground that it is not supported by the evidence.

21. Further exception is taken to the reporting of only the testimony of Cree and Miss Fowley and to the failure to report the testimony of witnesses, called by the Commission and respondents, who contradicted all the important statements contained in Cree's and Miss Fowley's testimony (See Paragraph 7, *supra*).

"Opposing New Mills"

Paragraph 188

1. Exception is taken to the statements in Paragraph 188 that "at various times respondents through and with the Institute have cooperated in combatting or discouraging the organization of new companies and the erection of new mills to compete with those already established in the industry". This statement is not supported by the evidence and is a misleading and inadequate reference to the facts.

2. Exception is taken to the failure to report the circumstances leading up to the inclusion of Article VII in the Code, as follows:

From 1924 through 1928 consumer demand for cement had increased steadily. As a result of this, many new mills came into production so that by the end of 1929 total U. S. capacity had increased to almost 260,000,000 barrels per year. By 1931, capacity had been further increased to about 270,000,000 barrels (Resp. Exs. 3508; 3558-59; 3661; 3765 B, C; 3769-73). But by the end of 1933, the year in which the NRA Cement Code went into effect demand had decreased precipitiously and Portland cement shipments had dropped off from a total of 174,680,726 barrels in 1928 to 63,305,426 barrels. Total estimated capacity in 1933 was 269,387,000 barrels. The rate of utilization of capacity had dropped off from over 72 per cent in 1928 to 23.6 per cent. By 1933, therefore, cement manufacturers had reached the low point in a period of extreme economic distress (Resp. Exs. 3508; 3558-59; 3661; 3774-77; Tr. 38633-34). The provisions of Article VII of the NRA Code were designed to prevent further distress. Under this Ar-

ticle, no power was given to the Cement Institute to prevent the erection of new plants or to prevent the enlargement of existing plants. The power was merely one of petition and this the Institute exercised (Com. Ex. 557; Tr. 4438-39; 24016-18).

3. Exception is further taken to the failure to report that there had been no Committee on New Plants and no action regarding proposed plants prior to the NRA Code provision (See citations to Exception No. 5, below).

4. Exception is further taken to the implication that the action taken pursuant to the Code provision was not strictly in accordance therewith. This is not supported by evidence. Moreover the Examiner rejected evidence showing that the action taken was strictly in accordance with Article VII (Resp. Exs. 171 A-E for id.).

5. Exception is further taken to the failure to report the following regarding action taken pursuant to Article VII:

The first proposed new plant that came under consideration pursuant to this provision was that of the National Portland Cement Company at Brodhead, Pa. Accordingly, the Chairman of the Code Authority, pursuant to the Code, appointed a committee of three manufacturers to make the study authorized under Article VII. This was the Committee on New Plants (Com. Exs. 616-C; 924-5R; Tr. 4438-39; 24015; 24844). This Committee handled one other case pursuant to Article VII of the Code. In both cases the Committee prepared data on the basis of which petitions were submitted to the President of the United States under the Article. No further action was taken by the Committee, the Institute or by any respondent in either case (Tr. 4438-39; 24019-21; 29606-07). The respondents were not permitted to prove that both petitions were denied (Resp. Ex. 171 E for id.).

Article VII was eliminated from the revised Code as approved May 11, 1935, because it was deemed useless in view of the indisposition of the Administration to act on

the petitions filed pursuant to its provisions. The Committee on New Plants was inactive after June 1934 and passed out of existence entirely with the approval of the revised Code (Com. Exs. 557; 560; 562; 16F-16G; Tr. 24015-21).

Paragraphs 189-190

1. Exception is taken to the assertion in Paragraph 189 that there were activities directed to the discouragement of governmental projects on the ground that it unfairly and erroneously characterizes the evidence.

2. Exception is further taken generally to Paragraphs 189 and 190 in their entirety on the following grounds:

The statements and implications regarding the whole T.V.A. episode are not supported by the evidence and misinterpret and unfairly characterize the origin, conduct and conclusion of the negotiations referred to.

The respondents were denied the right to produce evidence both testimentary and documentary which showed the complete negotiations of interested bidders with representatives of T.V.A., their origin, purpose, progress, and outcome, including specifically all of the subjects reported in Paragraphs 189 and 190 (Resp. Exs. for id. 2190; 2194-97; 2201-04; 2915-17; 2922 A-Z3; Tr. 31433-50; 31478-504; 31515-38; 31558-71; 31587-649; 31657-64; 31668-69; 31676-81; 31693-98; 32929-60; 36081-86; 38220-24; 38326-65; 38392; 38397-402; 38413; 39467-76; 41456-58; 48647). Moreover, some of the citations in Paragraphs 189 and 190 consist of exhibits and testimony adduced by the government, but subsequently stricken by the Trial Examiner (Com. Ex. 343 A-B and Tr. 1958, relating thereto; Com. Exs. 347 A-I; 348 A-B; 349 A-C; 351 D-F; 352 A-D; 353 A-C; see: Tr. 33883-86; Tr. 1930-2176; Com. Exs. 342, 358).

3. Exception is taken to the statement in Paragraph 189 that Dr. Morgan in 1934 decided that it would probably be to the advantage of the Government for T.V.A. to build its own plant. This statement is not supported by the evidence.

4. Exception is taken to the implication in Paragraph 189 that in 1934 at the time T.V.A.'s negotiations with interested cement manufacturers were instituted, T.V.A.'s program definitely called for 10,000,000 bbls. of cement. The evidence shows that at that time T.V.A.'s cement requirements were indefinite and no appropriation has been made for any T.V.A. project other than Norris Dam and that T.V.A.'s actual requirements fell far short of its subsequent estimates made during the summer of 1934 (Tr. 1962-64; 31670-75). Further evidence to this effect was rejected by the Examiner (Tr. 31676; 38401-02).

5. Exception is taken to the statement in Paragraph 189 that The Cement Institute took part in the T.V.A. negotiations on the ground that it is contrary to evidence. The evidence showed that The Cement Institute had no connection or association with the negotiations with T.V.A. (Tr. 33936-39; 33948-50; 38663); and that only the mills in the Southeast which were potential bidders participated in these negotiations (Com. Ex. 344 D-E; Resp. Ex. 48 D; Tr. 2145; 29541; 31612; 33949; 36510; 37281; 38663).

6. Exception is taken to the implication in Paragraph 189 that cement manufacturers or their representatives, other than John Treanor and manufacturers in the marketing area affected by the T.V.A. program, participated in negotiations with T.V.A. This is not supported by the citations and is contrary to the evidence (See citations to Exception 6, *supra*). Further exception is taken to the failure to report the following evidence:

John Treanor's participation in the negotiations was solely the result of his personal friendship with Dr. Morgan. He was never authorized to represent any of the interested southeastern cement manufacturers (Tr. 1977-78; 2145; 31613; 38673-74; 38676-77).

C. F. Conn, attended a luncheon conference with Dr. Morgan on February 27, 1934. This conference had been arranged by John Treanor at Dr. Morgan's request (Com. Ex. 344 A; Resp. Ex. 48 A; Tr. 1977-78; 2145; 33936-39). Conn attended no other conferences and there is no evidence that he took any part in any of the negotiations that came about as a result of this conference (Tr. 2153).

J. S. Young, J. R. Hanahan, George Kilian and Blaine S. Smith were all associated with companies located in the general area affected by the T.V.A. program (Tr. 33937-40; 33948-50; 38663).

B. H. Rader was chairman of the Code Authority at this time and was not a representative of The Cement Institute (Tr. 2799; 16726-27; 16941-42; 16958; 16964-70). There is no evidence that he took any part in the T.V.A. negotiations.

7. Exception is taken to the statement in Paragraph 189 that data and arguments in discouragement of the erection of a plant were submitted to T.V.A. on the ground that it is contrary to the citation given and is otherwise unsupported by the evidence. The evidence shows that during the course of the negotiations with T.V.A. each interested southeastern manufacturer submitted complete data and facts concerning its business and its costs to T.V.A. and that there was a free and open exchange of such data between the T.V.A. on the one hand and the committee representing the local manufacturers on the other (Resp. Ex. 48 D-E; Tr. 38670-72; 38677-78). The Trial Examiner, however, refused to permit respondents to show what the data and the facts submitted to T.V.A. were (See Exception No. 2, *supra*).

8. Exception is taken to the implication in Paragraphs 189 and 190 that there was some connection between the $1.30 figure and the investigation into the per barrel cost of manufacture in a proposed T.V.A. plant. Such implication is unsupported by any evidence. The Trial Examiner rejected respondents' evidence offered to prove that T.V.A.'s estimates of such cost were ridiculously low and struck other respondents' evidence on this subject (See Exception No. 2, *supra*).

9. Exception is taken to the statement in Paragraph 190 that an "agreement was reached" and the further implication that there was an accord concerning either the figure of $1.30 or the method of calculating the prices to T.V.A. The citations given bear no relation to the statement or implication and there is no evidence to support it.

Further exception is taken to the Trial Examiner's failure to report the following evidence:

The negotitions with T.V.A. were brought to a sudden termination when T.V.A. laid down an arbitrary take-it-or-leave-it low price and accompanying formula with a threat to construct its own plant unless it was accepted. The interested bidders did not agree to this price or formula. They submitted to it in the face of disaster if further cement capacity were added to the already distressed southeast (Tr. 2095-97; 2102-03; 31667-69; 38365; 38377; 38392-94).

One of the prospective bidders accepted the ultimatum and without consultation or agreement with any of its competitors filed with the Code Authority its prices for the T.V.A. letting of October 15, 1934, in accordance with Dr. Morgan's formula. The Code Authority notified interested companies of the prices so filed and substantially all the local companies quoted those prices (Com. Exs. 925-6A; 6D; Resp. Exs. 2206 B-26Z; 2918-21; Tr. 2098; 31667-68; 38365-66; 38374-402).

The prices filed and quoted were of three types: first, delivered at dam site in company hired barge; second, delivered at the rail head on the river so that T.V.A. could use its own barges if it desired; and third, delivered at the nearest destination to the dam site. Although during the negotiations T.V.A. claimed to be able to secure lower water rates than the interested companies had been able to secure, in no instance did T.V.A. accept delivery of cement at the rail head on the river for transportation to dam site in its own barges (Resp. Exs. 2918-21; Tr. 38335-45; 38360-63; 38375-90; 38533-34).

10. Exception is taken to the failure to report in Paragraph 190 that the committee representing the southeastern manufacturers desired to file with the Department of Justice a complete memorandum concerning the negotiations with T.V.A. but were deterred by the chief solicitor of T.V.A. (Tr. 2161-62; 11311-14).

11. Exception is taken to the failure to report in Paragraph 190 the evidence regarding the proposal of T.V.A.

to build a plant and the reason why it was not constructed:

T.V.A. used the threat to build its own plant as a means of forcing down the price. At the time of the negotiations there was, to the knowledge of T.V.A., great opposition to its program in Congress, and its appropriation for the year 1934 had already been cut from $50,000,000 in 1933 to $25,000,000. It knew that a further appropriation to construct its own plant was hardly likely. Moreover, in 1933, the economic situation in the southeastern section of the United States had been extremely bad. In that year, the total capacity of manufacturers located in that section of the country was about 25,500,000 barrels. Total shipments from plants of these manufacturers had amounted to only 5,809,792 barrels, an alltime low. The situation was the same throughout the country in all industries, and the Administration had taken steps to remedy it by passing N.I.R.A. NRA and the Administration recognized the need for preventing further economic distress in the cement industry by approving Article VII of the Cement Code (Com. Ex. 557; Resp. Exs. 3508; 3661 D; 3778; Tr. 38392-94; 38633-34; 2107).

A threat to build a government plant in the southeast under these circumstances was serious to the local manufacturers (Resp. Exs. 3661 D; 3777-81). T.V.A. used this threat in the course of its negotiations (Tr. 38330) and finally as the alternative to accepting Dr. Morgan's formula price. (See *supra.*) By accepting the ultimatum, the threatened plant was prevented (Tr. 38392-94).

12. Exception is taken to the reliance in Paragraph 189 on Com. Exs. 340 to 361 F because respondents' proof relating thereto was stricken or rejected by the Examiner (Tr. 32929-59; 38330-46; 38349-61; 38363-65; 38392-93; 38401-02).

13. Exception is taken to the implication in Paragraphs 189 and 190 that the T.V.A. negotiations were instituted by the manufacturers. This is contrary to the evidence. Further exception is taken to the failure to report the following:

The first T.V.A. bids were taken during the period when the cement industry was operating under the open price filing provisions of its NRA Code. The lowest price which was filed with the Code Authority was met by all bidders. Thus the prices bid were identical (Tr. 2116-17; 31453-54; 31656-57; 38662-63; 39864). Because the prices were identical Dr. Morgan, T.V.A. chairman, felt he had no way of knowing whether they were reasonable. He explained his difficulty to John Treanor, a personal friend of long standing, and through him, a luncheon with representatives of cement manufacturers was arranged in order that he might explain his problem to them (Com. Ex. 344 A-E; Resp. Ex. 48 A-C; Tr. 1977-97; 2145; 31613; 33936-40; 38663-64). The discussion at luncheon led to a proposal by Dr. Morgan that a joint study be made by representatives of the T.V.A. and representatives of manufacturers interested in T.V.A. business with a view toward determining what a fair and reasonable price might be. Blaine S. Smith, as the only manufacturer present with interests in the T.V.A. region, undertook to present Dr. Morgan's proposal to cement manufacturers in that region. This he did and at the same time Dr. Morgan notified the T.V.A. Board of the proposed study and all parties agreed that the study be made (Com. Ex. 344 C-E; Resp. Ex. 48 B-C; Tr. 1977-97; 2145; 31612-13; 33939-40; 33943; 33947-50; 38663-64).

Committees were appointed by T.V.A. and by the interested producers in the southeast and a T.V.A. representative was permitted to examine cost data relating to these companies as compiled by Price Waterhouse (Com. Exs. 348 A-B; 349 A-C; Resp. Ex. 48 C-D; Tr. 2145-47; 31612; 31613; 33948-49; 38670-78).

Other facts and figures were in preparation for the fair price study when T.V.A. suddenly proposed to build its own plant unless it could secure a price equivalent to $1.16 f.o.b. mill. The local producers attempted to convince T.V.A. that this was far below their cost and that T.V.A. could not possibly produce its own cement at that low figure. The study then turned from consideration of a fair price for cement to that of determining a price competitive with the price of a hypothetical T.V.A. plant (Com. Ex. 353 A-C; Tr. 2073-76; 31639-40). This phase of the study was inter-

rupted and terminated by Dr. Morgan's arbitrary ultimatum referred, *supra*.

14. The Examiner struck from the record or rejected all respondents' proof with respect to the specific activities of the various committees engaged in the negotiations (Tr. 39467-76; 41444; 41456-58; see Exception No. 2, *supra*).

Paragraph 191

1. Exception is taken to the statement in Paragraph 191 that "other protests were made" on the ground that it is supported neither by the citations given nor by the evidence.

2. Exception is taken to the implication in Paragraph 191 that the Foreman, Arkansas, plant was not completed because of the protest made to the R.F.C. This is contrary to the evidence. Further exception is taken to the failure to report that the R.F.C. authorized a loan of $50,000 to the Foreman plant after the protest and that The Cement Institute took no further action with respect to the matter (Tr. 4462-64; 24021-22).

3. Exception is taken to the failure to report the following evidence concerning the matters referred to in Paragraph 191:

Initially, in the cases of both the Foreman and the Orofino plants, the R.F.C. asked the Portland Cement Association for information with respect to conditions of supply and demand in the areas where the proposed plants were to be located (Com. Exs. 415[22]; 574 M; 575 G-H; 1028 B; Tr. 4449-50).

The R.F.C. request concerning the Foreman plant was made during the effective period of Article VII of the first NRA Cement Code. The P.C.A. therefore referred the request to the Code Authority for handling and the Code Authority referred it to the Committee on New Plants which supplied the requested information. The R.F.C. did not grant the loan at this time but did grant an application for a $50,000 loan later after a protest had been filed by the Institute. No further action was taken

either by the Institute or by any respondent company. The evidence does not indicate why construction of the Foreman plant was not completed (Com. Exs. 415[22]; 500 B; 574 M-N; 942 B-C; 1029 A, B, G; Tr. 4461-64; 24021-22).

When the R.F.C. made its request concerning the Orofino plant in 1936, the P.C.A. with the Foreman experience in mind, referred it to The Cement Institute and the Institute filed a telegram on behalf of members marketing cement in the affected area, pointing out the current conditions of supply and demand (Com. Exs. 575 G-H; 1028 B; Tr. 4449-50).

Existing capacity in the areas in which these proposed plants were to be located has at all times within the last eleven years far exceeded consumer demand (Resp. Exs. 3508; 3661 D-F; 3774-81).

Subsequently, the Institute forwarded all information it had concerning these plants to the P.C.A. so that the P.C.A. might be in a position to handle directly any future R.F.C. request for information (Com. Exs. 1028 F, G; 1029 D).

No further action was taken either by the Institute or by any respondent company. The evidence does not indicate whether or not the R.F.C. granted the Orofino plant's application for a loan, but the plant was built and is now in operation (Tr. 4449-50).

4. For further exceptions to the subject matter of Paragraph 191, see exceptions to Paragraph 188, *supra*.

Paragraph 192

1. Exception is taken to the implication in Paragraph 192 that the Cement Information Bureau was set up or operated as a vehicle for opposing new plants and to the failure to report that it operated merely as a clipping service providing information of interest to the members (Tr. 4452; 4472).

2. Exception is taken to the statement that the Cement Information Bureau sent out the advertisements referred to in Paragraphs 161 and 162 on the grounds and for the reasons stated in the exceptions to those paragraphs, *supra*.

3. Tr. 4460-64 and 4471 cited in Paragraph 192 have no bearing on the statements for which they are cited. Tr. 4452-59; 4468-70; and 4472-77 do not support the statements for which they are cited and in large part are to the contrary.

Paragraph 193

1. Exception is taken to the statement in Paragraph 193 that members and the Institute were active in opposition to efforts to rehabilitate the Hartshorne plant. It is not supported by the citations given and there is no evidence that either the Institute, the Cement Information Bureau or any member of the Institute took any steps to oppose efforts to revive the Hartshorne plant (See Tr 4450; 4460; 4464).

2. Exception is taken to the statement that the Cement Information Bureau requested reports and to the failure to report that there was no obligation on members of The Cement Institute to make reports to the Bureau (Tr. 42322).

3. Exception is taken to the quoted excerpt from Com. Ex. 197 Q out of its context and to the failure to quote the entire sentence as follows:

> "It would, of course, be a serious mistake to put another plant into an already overdone territory and we are vitally interested in discouraging anybody in such an enterprise."

Further exception is taken to the failure to report that for the year 1935, total shipments from plants located in this respondent's Bureau of Mines district were 6,059,932 bbls. as against a total capacity of 17,409,000 bbls. for those plants in that year (Resp. Exs. 3661; 3774-8; Tr. 42322-23).

4. Exception is taken to the statement that "other respondents were interested" on the ground that this is not shown either by the citations given or by any evidence. Further exception is taken to the failure to report that there is no evidence that any of the respondent companies

mentioned in the second sentence of Paragraph 193 other than Ash Grove and Monarch ever received the information sent out by Col. Reynolds and that the only evidence of replies by any of the companies listed or by any other company is Com. Exs. 197 B and P-Q, reply letters of the Monarch Company and Com. Ex. 197 E, a reply letter of the Ash Grove Company. Exception is also taken to the failure to report that the Mr. Lehaney referred to in this sentence was associated with Lone Star's Kansas City office (Com. Ex. 197 V).

5. Exception is taken to the unsupported inmplication that the newspaper announcement was sent to Col. Reynolds by a respondent.

6. For further exceptions to the subject matter of this paragraph, see exceptions to Paragraph 188, *supra*.

Paragraph 194

1. Exception is taken to the Examiner's statement in Paragraph 194 that "similar action was taken by the Institute and its Bureau" because there is no indication of the "action" to which the adjective "similar" is intended to apply, and no evidence that the Bureau had anything to do with any of the matters referred to in the balance of the paragraph, or in Paragraphs 189, 190, 191, and 193.

2. Exception is taken to the failure to report that the proposed Ohio plant and the erection of the Northwestern plant long antedated the formation of the Cement Information Bureau (Com. Exs. 621 D; 3172 A, C; Tr. 8583-84; 48115; Resp. Ex. 3765 C); and there is no evidence that the Bureau took part in activities with regard to any of the other proposed new mills referred to and the evidence shows the Bureau was not even in existence at the time when some of the proposals occurred (See Com. Exs. 621 D; 924-5R).

3. Exception is taken to the statement that the Institute took action against the Northwestern Portland Cement Company's mill on the ground that it is contrary to the evi-

dence. Northwestern's mill began operating in June 1928, more than a year before the Institute came into existence (Com. Exs. 136 A; 3172 A, C; Resp. Ex. 3765 C; Tr. 8583-94; 48115).

4. Exception is taken to the unsupported implications that the Institute and its Bureau took action against the government cement plant in Puerto Rico and to the failure to report that the evidence [to the extent respondents were permitted to produce evidence on the subject] shows that members of the industry merely filed a protest which did not go beyond an exercise of the right to petition the government; and neither the Institute nor any of its members took any action beyond that with respect to this plant (Tr. 31364-68; 31372-73; 4471; Com. Ex. 627 D; Tr. 4464). The protest was ineffective and the Government has since completed the plant at a final construction cost of between $3.50 and $4 per bbl. of capacity (Tr. 4471; 31373).

5. Exception is taken to the statement in Paragraph 194 that the Institute took action against the promotion of the Ohio plant on the grounds and for the reasons stated in exceptions to Paragraph 188. Further exception is taken to the failure to report the following regarding the proposed Ohio plant: Cement plants located in Bureau of Mines District #3, in which the proposed new plant was to be located, had shipped a total of 5,815,717 bbls. of cement in 1933 as against a total capacity in that year of 28,725,000 bbls. Thus there was more than ample capacity in the district to take care of any possible demand (Resp. Exs. 3661 C; 3777-78; Tr. 29606-09). A petition was filed with the President of the United States in accordance with the provisions of Article VII of the NRA Cement Code. No further action was taken by the President, by the Institute or by any respondent. The proposed construction proved to be nothing more than a promoter's stock selling scheme, and the company never proceeded beyond the promotional stage (Com. Exs. 415[41]; 812 S; Resp. Ex. 1851; Tr. 24020; see also Exception 2 to Paragraph 188, *supra*).

6. Exception is taken to the indefinite phrase "several other proposals" in Paragraph 194, and to the failure to

report that the evidence shows only two such proposals, one involving the National Portland Cement Company and the other a plant in Los Angeles.

7. Exception is further taken to the failure to report the following evidence with respect to the National Portland Cement Company: Cement production of cement mills located in the Lehigh Valley producing area, in which the proposed new plant was to be constructed, dropped off from a total of 37,426,967 bbls. in 1929 to the all time low point of 11,813,561 bbls. in 1933. Total cement capacity of Bureau of Mines District #1, which comprises the Lehigh Valley producing area, was 56,399,000 bbls. in 1933. Cement shipments from the plants in that year amounted to 11,946,187 bbls. an all time low. When the National plant was proposed the District had more than ample capacity to take care of any possible demand (Resp. Exs. 3488 A-D; 3661-C; 3774-81).

A petition was filed with the President of the United States in accordance with the provisions of Article VII of the NRA Cement Code. No further action was taken by the Institute, or any respondent, nor was any action taken by the authorities with whom the petition was filed. The plant of the National Portland Cement Company was completed and put in operation (Com. Ex. 629-B; Tr. 24019-20; 24845; see also exceptions to Paragraph 188, *supra*).

8. Exception is taken to the statement in Paragraph 194 that the Institute and its Bureau took action against the proposal for the new Los Angeles plant, on the ground that there is no evidence to support it and further exception is taken to the failure to report the following: In April 1934, during the effective period of Article VII of the NRA Cement Code, a member of the Industry in the area affected asked the Cement Code Authority if it could take any action concerning a proposition made to the Metropolitan Water District of Los Angeles for construction of a plant for the manufacture of cement commercially and for that body (Com. Ex. 553-2M). Total shipments out of Bureau of Mines District #11, the district in which the proposed new plant was to be located, had amounted

to 7,168,835 bbls. in 1933 as against a total capacity in that year of 22,830,000 bbls. (Resp. Exs. 3661 E-F; 3774-81). The Chairman of the Code Authority was of the opinion that, while a petition could be filed with the President pursuant to Article VII of the Code, in view of the lack of action on the previous two petitions filed and the NRA attitude toward those petitions such a course would probably be ineffective (Com. Exs. 562 16-F-16G). The Metropolitan Water District rejected the proposal that it should build a plant (Com. Exs. 562-16J). There is no evidence that any action of any sort was taken by The Cement Institute with regard to this proposed plant, and the Cement Information Bureau was not in existence at the time (Com. Ex. 621-D).

Paragraph 195

1. Exception is taken to the statement in Paragraph 195 that the Institute and others were "active in this opposition work" on all the grounds and for all the reasons stated in exceptions to Paragraphs 188 through 194 inclusive.

2. Exception is taken to the statement in Paragraph 195 that Monarch, Ash Grove, Boettcher, Treanor, Affleck and Young "were shown to be active in this opposition work" because the exhibits cited do not support the statement nor does any evidence.

3. Exception is taken to the statement that John B. Reynolds was "shown to be active in this opposition work" on all the grounds and for all the reasons stated in exceptions to Paragraphs 192 and 193.

4. Further exception is taken to the failure to report the evidence that J. S. Young was chairman of the Committee on New Plants, appointed under Article VII of the NRA Cement Code (Com. Ex. 924-5R): Further exception is taken to the failure to report the evidence set forth in exceptions to Paragraph 188, *supra*.

"Collective Bidding"

Paragraph 196

1. Exception is taken to the implication in Paragraph 196 that the bids received on the Boulder Dam letting of April 1937 were identical on the ground it is not supported by the evidence and to the failure to report that Com. Ex. 135 shows on its face that the bids on this letting did not result in identical delivered costs and that the special freight rates from the mills of Southwestern, California, Santa Cruz, Monolith and Riverside were identical (Com. Ex. 135).

2. Exception is taken to the implication that some impropriety or violation of law was involved in the submission of a joint bid on this letting, as it was made pursuant to the decision of the Comptroller General, and to the implication that the joint bidders continued to cooperate in a general way as it is misleading and not supported by the evidence.

"The Burns and Clark Studies"

Paragraph 197

1. Exception is taken to the statement in Paragraph 197 that the Institute engaged in "activities in collecting and disseminating material for combatting new mills and adverse public opinion" on the ground that it is not supported by the evidence and on all the grounds and for all the reasons heretofore stated in exceptions to Paragraphs 161 and 162 and 188 through 195.

2. Exception is taken to all of Paragraph 197 because it implies that the Institute acted alone in causing the study to be made and exception is further taken to the failure to report the following evidence:

One of the members of the TVA Committee negotiating with the committee representing southeastern cement manufacturers (See exceptions to Paragraphs 189 and 190,

supra) was Dr. F. A. Fetter, an economist who was at the time in the employ of the F.T.C. (Tr. 2145-46; 48407-08).

Dr. Fetter was impressed with industry and problems brought out at TVA conferences and, together with Dr. Morgan, discussed them with Judge Healy of the F.T.C. and B. W. Murray of NRA. As the result of this discussion, these men, early in June, 1934, arranged a conference between the F.T.C. and John Treanor, who, due to his friendship with Dr. Morgan, had been participating in the TVA conferences. At the end of this conference, the F.T.C. suggested that Treanor submit a written memorandum of the points he had brought out. This Treanor did and thereafter he engaged in a further series of conferences with the F.T.C. and its staff. In none of these conferences was Treanor authorized to speak for the entire cement industry or for any group of respondents and he so informed the F.T.C. (Com. Exs. 350 E-F; 351 A-C; 562-10Q-10R 653-36; Resp. Exs. 3766 A-C; Tr. 16692-93; 42877-78). Further evidence to this effect was rejected by the Examiner (Resp. Ex. 3767 for id.).

On July 27, 1934, at a conference with the F.T.C. and some of its staff, Treanor suggested that a joint study by F.T.C. economists and economists selected by the Industry be made of all phases of cement industry practices. The suggestion was looked upon favorably by certain members of the F.T.C. staff (Resp. Exs. 3766 A-C).

Treanor had as yet had no authority from members of the Industry with regard to this proposal. At the next meeting of the Board of Trustees of The Cement Institute, Treanor summarized the history of his conferences with the F.T.C. and explained the joint study proposal. The Board thereupon voted unanimously in favor of a resolution approving a cooperative study of methods of marketing cement on the part of the members of the cement industry in collaboration with the F.T.C. and authorizing the appointment of a Marketing Research Committee. The following is a copy of the resolution:

> "Be it Resolved
>
> That the Board of Trustees of The Cement Institute believes that it is in the interest of the industry and of the public to promote sincere and

truly cooperative studies concerning problems in the distribution of cement, and

"Be it further RESOLVED

That the Board highly commends Mr. John Treanor for his personal efforts to explain cement problems to government agencies, and

"Be it further RESOLVED

That the Chairman of the Board is hereby authorized to appoint a special committee to facilitate cooperation between government agencies and individual cement companies, and

"Be it further RESOLVED

That the said committee—to be known as The Marketing Research Committee—is hereby authorized to retain such economists or other experts and aides as may be necessary to discharge its functions and to incur other necessary expenses, subject to the approval of the President of The Cement Institute, and

"Be it further RESOLVED

That the Board specifically approves a cooperative study of methods of marketing cement on the part of members of this industry in collaboration with the Federal Trade Commission, and the Board hereby requests each member of the industry to accept the invitation of the Federal Trade Commission and the opportunity afforded by it to pursue a joint study of marketing facts and problems to the end that current individual methods of selling and distributing cement may be more generally understood or improved."

Thereafter, the Committee was appointed (Com. Exs. 621 B-C; Resp. Exs. 3766 A-C; Tr. 16692-93; 16890-91; 34737-38; 36663; 38465-66; 41621-22; 42877-78).

The retention of economists authorized by the above resolution was delayed until October of 1934 pending further clarification of the F.T.C.'s position. It finally developed that because of the press of other business members of the F.T.C. staff would be unable actively to participate in the study. At first, the F.T.C. was inclined to withdraw its participation entirely. Subsequently, however, the F.T.C. made arrangements whereby it authorized

members of its economic staff to confer with economists provided by the industry concerning the character and form of data to be obtained by the industry through its own efforts. In the meantime, the Marketing Research Committee had engaged Dr. Clark, of whom the F.T.C. had given its unqualified approval, and his associate Dr. Burns to carry on the work. After the F.T.C. had notified the Committee of its willingness to participate to the extent indicated, the Committee authorized Drs. Clark and Burns to make their findings available to the F.T.C. and to discuss with complete openness all the details of the investigation with the F.T.C. economists (Com. Exs. 817-6H; 953 E, N, P, W; 958 J-N, U-Y, PP; 971 B-C; 1109 A; Tr. 16692-93; 16890-91; 38465-66; 38541-46; 48409-09).

In the course of the work of drafting a questionnaire to be forwarded to all members of the industry Dr. Clark and Dr. Burns conferred with both the Marketing Research Committee and with F.T.C. economists. The final form of the questionnaire was approved by the latter (Com. Exs. 571-2Y-2Z; 817-6H; 913-7B-7C; 953-3G-3H; 971-5Q, 5W, 5X; Tr. 38543-46).

3. Exception is taken to the phrase in Paragraph 197, "basing point system of marketing as practised by the industry", on all the grounds and for all the reasons stated in exceptions to Paragraphs 88 through 92, *supra*.

4. Exception is taken to the failure to report that all information supplied by the Committee to the professors was supplied on request of the professors (Tr. 38466; 38540).

5. Com. Exs. 956-3W-5Q, 5S-14X, 15A-15B, 15F-18o, all cited in Paragraph 197, were never received in evidence.

6. Com. Exs. 956-5R, 14Y-14Z, 15C-15E and 18P do not in any degree support the statement for which they are cited. These exhibits are correspondence between F. M. Coogan of the Alpha Company and Dr. Burns concerning answers of various Alpha mills to the questionnaire. It is obvious from the face of each document that Mr. Coogan was acting in his capacity as an officer of the Alpha company and not as a member of the Marketing Research Committee.

Paragraph 198

1. Exception is taken to the implication in Paragraph 198 that the Clark-Burns survey was completed in June 1937. There is no evidence that the survey has ever been completed.

2. Exception is taken to the quotation in Paragraph 198 of a small excerpt from Com. Exs. 913-4H out of context on the ground that it tends to mislead. Further exception is taken to the failure to report that the two sentences immediately following the quoted portion of the exhibit are as follows:

> "I am sure you recognize, as I do, the importance of having a pronouncement upon this subject from men of the professional standing of Clark and Burns (Clark in particular being in the front rank and an authority upon this especial phase of industry). This is especially true since the views are based upon the most complete industry data that has ever been assembled."

3. Exception is taken to the entire last sentence of Paragraph 198 and the quotation contained therein because the exhibit on which it is based has never been received in evidence.

Paragraph 199

1. Exception is taken to the first sentence of Paragraph 199 because it implies that answers of individual companies to the Clark-Burns questionnaire were forwarded to and discussed and revised by the Committee before being sent to the professors. This is supported neither by the citation given nor by any evidence. The evidence shows that answers of respondent and other companies to the questionnaire were sent direct by them to Drs. Clark and Burns (Com. Exs. 958 U; 971 C; Tr. 3140).

2. Exception is taken to the second sentence of Paragraph 199 because it implies that the Committee attempted to supply Clark and Burns with false information. This is contrary to the evidence. The evidence shows that it was

the object of the Committee to see to it that Clark and Burns had all of the true and correct information they might require for their survey (Tr. 23945-48; 27300-01; 36663; 38465-66; 38541; 42877-78).

3. Exception is taken to the quotation of a partial extract from Com. Exs. 571-2L out of context on the ground that it tends to mislead. Exception is taken to the failure to quote the balance of the paragraph from which this excerpt is taken as follows:

> " * * * it has been our thought that much more could be accomplished by personal contact than through the medium of correspondence. The plan that we have discussed is simply to arrange a meeting shortly with the professors, to which would also be invited—in addition to the members of the Committee—certain sales and traffic experts with general knowledge and wide experience, preferably from companies other than those represented by the Committee. The professors could possibly prepare in advance a list of questions that had proved particularly bothersome. These questions could be submitted to the group of cement men and we would attempt to have those best qualified discuss the points involved with the professors until the matter was thrashed out to everyone's satisfaction. By adopting this procedure we felt that we could more comprehensively and more completely answer the many points that unquestionably have arisen in the minds of the professors in reviewing the answers to the questionnaire form."

4. With respect to the statement in Paragraph 199 that the report of Professors Clark and Burns was not produced when subpoenaed, exception is taken to the failure to report that the Federal Trade Commission issued an order on motion of respondents expressly stating that "said subpoenas, however, are not to be interpreted as calling for the production of the text of the report as written by Professors Clark and Burns." (See Order of F.T.C., Docket 3167, February 1938).

5. Exception is taken to the failure to report that each respondent understood that, in answering the Clark and Burns questionnaire, it was to give facts and material

which were to be considered by Clark and Burns together with answers submitted by other companies with the purpose in view of making a fair and unbiased summation of practices prevalent in the cement industry (Tr. 3139-40; 27300-01; 34737-38; 36663; 38499; 38541; 41621-22; 42226; 46950-53).

"Price Filing"

Paragraph 200

1. Exception is taken to the statement that dissemination of prices filed was "not required" by the Code and to the failure to report that notice to Code members of prices on file was necessarily implied from the fact that the Code gave competitors the right to meet prices which were on file, and that this right could not be exercised unless the prices on file were furnished to members of the Code by the Code Authority. The amended Code merely recognized the implied provision by an express one (Tr. 3064-66; 16992-94).

2. Exception is taken to the statement that The Cement Institute participated in the administration of the open price plan during the Code period on the ground that it is not supported by the evidence (See exceptions to Paragraph 4, *supra*).

3. Exception is taken to the unsupported inference that members filed prices only when expecting to bid lower than the going price.

4. Exception is taken to the unsupported statement that the Code Authority relayed prices on file "so they (*i. e.*, members of the industry) could and did bid" identical prices and to the failure to report that the purpose of price filing provisions in the NRA Code was to eliminate price discrimination and secret price concessions. This is so stated in Paragraph 130 of the report (See Com. Exs. 277 K-M).

5. Exception is taken to the implication that the Code Authority made a check only where the later filing was

lower than existing filed prices. This is not supported by the evidence. The evidence shows the following:

The Code Authority checked variations in prices filed in a few cases only; and did so only where it had reason to believe that an error had occurred in the transmission or transcription of the filing so that it did not accurately represent the intent of the filing party. In such cases a check was made regardless of whether the newly filed price, or the filing supposedly in error, was lower or higher than the putative prevailing price (Tr. 3825-37; 16999-700; 35924-26).

Paragraph 201

1. Exception is taken to the statement that price increases are "always made effective five days after the date of the notice" to the trade and to the failure to report the evidence set out in exceptions to Paragraph 93 (j) *supra*, and further as follows:

Article IX, Section 4-a-(2) of the NRA Cement Code provided that the trade must be given notice of price advances and that such advances must be made effective five calendar days after expiration of the notice. During the period of the Code this provision brought about general use of the five day waiting period (Com. Ex. 557).

Except for the NRA code period there has been no uniformity with regard to the period of advance notice (See: Tr. 17111-2; 36659-60; and citations to exceptions to Paragraph 93 (j), *supra;* also exceptions to Paragraphs 7-81; *supra*).

2. Exception is taken to the statement that "if competitors broadcast similar quotations, indicating they are following the rise, the price is permitted to stand; otherwise it is withdrawn". This is not supported by any evidence. Exception is further taken to the failure to report the evidence showing that advances in price cannot hold unless all competitors meet the advance and many attempts to advance prices have not held because they were not met by all competitors (Tr. 24641-43; 6263-64; 30041; 40056; 40629-30; 3778-84; 8903; 37518-23; 23380-01; 42013; 30050;

32825-28; 38701; 28774). Further evidence to this effect was rejected by the Trial Examiner with the statement that there was "abundant testimony from various respondents on the subject" (Tr. 32826-27).

3. Exception is taken to the statement that prices and terms were filed and distributed "after the *Schechter* case and after the Trade Practice meeting" of September, 1935, and to the failure to report that most of the respondents discontinued filing prices and destination costs prior to the discontinuance of the price filing service by the Trade Practice Committee in December 1935 (See: citations to exceptions to Paragraph 134, *supra;* also exceptions to Paragraphs 7-81, *supra*).

4. For further exceptions to the subject matter reported in Paragraph 201, see exceptions to Paragraph 134, *supra.*

"Contract Checking"

Paragraph 202

1. Exception is taken to the failure to report the following in Paragraph 202:

Specific job contracts have, in effect, and by universal practice, been treated by cement manufacturers as free options. The purchaser is not obligated in any event to take the cement contracted for unless he chooses to. He is not held to the price named in the contract in the event of a decline in the market price, whereas the manufacturer may be held for the contract price if the market advances (*C.M.P.A. v. U. S.*, 268 U. S. 588, 596; Tr. 26765-66; 26793-822; 28889-909; 33074-75; 26802-03; 35914; 38025-26; 4203; 23456-58; 23995; 26123-26; 26148-51; 36028-31; 41817-18; 36247-50; 36816-17; 40062; 42416-17; 39493-501; 28081-85; 37704; Resp. Exs. 3534; 3560; 3561; 3545; 3546; 3548). The purpose of the contract is to enable contractors to bid for future construction work with the assurance that the requisite cement will be available at a definitely ascertained maximum price (Tr. 30566; 36816-17; 23454-55; 23458-59).

In view of the option features of the contract, the contractor is involved in no business risk if he enters into several specific job contracts with different manufacturers for cement for a single job. Contractors can thus take advantage of their position to get cement with price protection, although the cement is not required for the particular job (Tr. 4202-03). Specific job contracts usually provide that the cement is only to be used on the job referred to in the contract (Resp. Exs. 1120-29; 560-62; 617-18; 3367-68). The use of the cement for any other purpose is a violation of the terms of the contract. All specific job contracts give the purchaser the benefit of any reduction in price (Resp. Exs. 1120-29; 560-62; 617-18). Further proof by respondents on the subject was curtailed by the Examiner (Tr. 37947-48).

2. Exception is taken to the statements that such sales resulted in either "over supplies of cheap cement" or an "unsettled price situation", on the ground they are not supported by the evidence.

3. Com. Exs. 128 and 193, cited in Paragraph 202, are not concerned with the subject of specific job contracts.

Paragraph 203

1. Exception is taken to the failure to report the following in Paragraph 203:

Cement manufacturers have from time to time collected and disseminated information concerning specific job contracts, thus placing each seller in a position to prevent contractors from securing future deliveries of cement from him which they are not entitled to receive under their specific job contracts (*C.M.P.A.* v. *U. S.*, 268 U. S. 588; Tr. 4196-98; 23901-03). This activity has not been carried on by the Institute or any other group of cement producers since October 1936, and was not carried on by The Cement Institute from the Spring of 1930 until the Fall of 1933 (Tr. 4196-98; 16729). Contract reporting was not carried on by the Institute during the price increases in June, July and December 1932, or June and July 1933 (Tr. 4196-98;

16729). The Supreme Court specifically approved contract reporting (*C.M.P.A.* v. *U. S.*, *supra*).

Contract reports are used by a cement company in assisting it in directing its sales effort to secure orders or contracts on jobs not already covered by contract. This results in lower sales cost and economy of effort (Tr. 36500; 30724-32; 30849-50). They are used in planning production and shipping schedules (Tr. 16751-52; 37241-42; 36499-500; 27862).

No information concerning the contract price was ever reported to or distributed by the Institute (Tr. 4197; 16753-54). (For complete account see Tr. 4196-207; 16747-87). The Institute never took any action of any kind to coerce or persuade any member either to cancel or refrain from cancelling any contract (Tr. 16786-87; 4203-04; 16756-57; 16782-87; 37241; 36497). This Institute service was never carried out for West Coast companies (Tr. 42447; 48116-17; 42894-95; 16710-11).

The second NRA Cement Code, as approved, provided for contract reporting (Com. Ex. 560, p. 15).

2. Com. Ex. 1070 B, cited in Paragraph 203, is not concerned with the subject of specific job contracts.

3. Exception is taken to the statement that the "industry advocated 'enforcement' of specific job contracts" as it is not supported by the evidence.

"Returned Sack Allowances"

Paragraph 204

1. Exception is taken to the failure to report the following in Paragraph 204:

The practices of manufacturers have varied concerning the repurchase of cloth sacks. Some companies have "always strictly limited" their repurchase of sacks to those which were in serviceable condition (Resp. Ex. 3788, p. 1513). Most companies "credited a considerable number of worthless sacks" (Resp. Ex. 3788, p. 1521).

The Cement Institute never had a committee to deal with the subject of allowances on returned bags. For a brief time in 1930 statistics on returned bags were collected by one or two of the division offices of the Institute (Resp. Exs. 145; 147; Tr. 16813). On April 1, 1931, this service was discontinued and was never revived (Tr. 16815).

The Cement Institute Bag Tax Committee (referred to at Tr. 4533-34 cited in Paragraph 204) was not concerned in any way with the repurchase from customers of cloth sacks. Its purpose and entire activity was confined to the securing of refunds on certain AAA processing taxes which individual manufacturers had paid under protest (Tr. 16739-42; 29166-67; Resp. Exs. 1808; 1809; 1810; 1811; 1812; 1813; 1814). Much of the evidence offered by respondents concerning the work of this Committee was rejected by the Examiner (Tr. 24007-12) and Commission's Counsel agreed not to contend that the activities of this Committee were illegal (Tr. 24007-08).

The Trade Practice reports of the A.A.P.C.M. in 1915 and 1919 (referred to in Paragraph 204) were never followed even by members of that association; and not by respondents (Resp. Exs. 3788, Q, 26).

During the NRA Code period, some manufacturers questioned whether sack returns were not being used as a method of deviating from the prices and terms filed pursuant to the NRA Cement Code (Com. Exs. 637 K-Q). The Code Authority took no action and there was no proof of any action on this matter.

The charge for sacks has varied to meet the cost of purchasing such sacks (Tr. 6030-31). Originally dealers were paid 7½ cents (Resp. Ex. 438). In 1910 Universal paid 10 cents (Resp. Ex. 2609 A-Z 64; Tr. 35977) while Alpha paid 7½ cents as late as 1912 (Resp. Ex. 443; Tr. 35978). In 1918 the refund was raised to 25 cents by some companies (Resp. Ex. 546). In 1919, it was 15 cents (Resp. Ex. 548). Other companies continued the 10 cent charge (Resp. Exs. 2822 B, 1440 B).

As early as 1919 one respondent (*Southern States*) paid for the freight on the return of bags (Resp. Ex. 2822 B). In 1921 some companies paid for ½ of the freight on re-

turned sacks (Tr. 46854-55; 46857; Resp. Exs. 3619 A-B). In 1922 a non-respondent Western States P. C. Co. inaugurated the practice of reimbursing customers for the entire cost. This was more favorable to the buyers, and competitors gradually adopted it in the 1920's from 1922 to 1928 (Tr. 42248; 46854-55; 46857; Resp. Exs. 3619 A-B; 2358 B-C; 564; 3157 E; 2538 E-G; 1441; 3014; 1125; 2907 E, G, i, K, *et seq.*; 2274; Tr. 41657-60). Other companies as early as 1922 had a practice of paying the freight on returned sacks whenever necessary to hold a customer (Tr. 41657-60; 46854-55; 46857; Resp. Exs. 3619 A-B).

2. Exception is taken to the statement that "difficulties arose over variations as between competitors of amounts allowed for returned bags" on the ground that it is not supported by the evidence.

"Reciprocal Shipments"

Paragraph 205

1. Exception is taken to the failure to report the following regarding the subject matter of Paragraph 205:

Only a small amount of standard Portland cement has been furnished or shipped by one manufacturer for the account of another and this has occurred only on isolated occasions under the following circumstances: where the contractor notified the company having the order that the county officials insisted that part of the order be purchased from another cement company because it was a local taxpayer, the entire amount of the price being remitted to the shipping company (Tr. 37206-08; Com. Ex. 2885); where the plant of the company having the order was shut down for repairs, or due to labor agitation and strikes, or the company had oversold its production and was unable to produce sufficient cement to fill its orders (Tr. 37208-10; 33963; 46904); where the customer complained about the service rendered by the company having the order and demanded that shipments be made from another mill (Tr. 46456-57); where the contract called for special bin tested

cement and bins were rejected and the company having the contract could not get additional bins accepted in time to meet the customer's requirements (Tr. 33964); where the contractor was closely connected and obligated to place all of his business with one company, and the particular point of use was out of that company's normal trade territory or where it required water delivery which it could not furnish (Tr. 46906-07; 46911).

The shipments of cement made by one company for another have consisted wholly or almost wholly of high early strength cement, white cement, dark cement and other special cements (none of which is related to the subject of the complaint herein) not manufactured by the company for whose account the shipments have been made. Shipments of special cements for companies which did not manufacture such cements increased in 1936 and 1937 due to the increased demand for such specifications. Prior to 1936 that demand was negligible (Resp. Exs. 1104-06; Com. Exs. 3046; 2689; Tr. 8142; 36838-39; 27397; 27414-15; 33963-64; 27414-15; 26302; 26306; 41608; 41640).

Manufacturers who have shipped cement for the account of other cement companies denied that any of the shipments for other companies, or vice versa, were made for the purpose of eliminating any disadvantage in freight or saving any extra costs and denied that they ever "traded" any orders with any other company. Shipments for the account of other mills have been made at a manufacturers' discount of 10 cents. The price to other cement companies was not dependent upon or related to the destination or to any basing point or base figure (Tr. 8139; 8144; 42220; 37771; 27415-16; 30454-55; 37212; 41607; 46920).

The shipments which have been made by one company for another company were explained fully by responsible executives of the companies involved who testified at length concerning the details of the transactions (Tr. 37206-10; 33963; 37777-79; 26272; 26317-19; 46902-17; 37212; Com. Ex. 3046; Resp. Exs. 1106 A-B).

2. Exception is taken to the assertion that shipments "from the near mill for the account of the far mill" re-

sulted in a saving of freight with extra profit to either or both mills on the ground that it misrepresents the references cited and there is no evidence to support it. Further exception is taken to the implication that shipments made by one company for another have depended on or been concerned with basing points, mill nets or freight costs or that there has been any agreement or concert of action by respondents to allocate or exchange shipments of cement on the ground that it is contrary to the evidence (Tr. 8140; 8144; 27419-20; 30454-55; 37212; 36835; 37212; 41607; 37771; 27394; see also Exception No. 4 to Paragraph 173).

3. Exception is taken to the statement that Marquette received larger mill nets on cement shipped by Kosmos for its account on the ground that it misstates the references cited and there is no evidence to support it. Exception is taken to the failure to report that the evidence showed the following:

The business which Kosmos filled for Marquette was a transaction which came about through a dealer in Memphis, Tenn., from whom Kosmos purchased a towboat under an arrangement to pay for it in cement. Marquette had a road contract at that time in the central part of Kentucky and the dealer in Memphis arranged with Marquette, on terms of which Kosmos had no knowledge, to take the cement at Memphis. The dealer from whom Kosmos purchased the boat asked Kosmos to ship cement to the point in central Kentucky instead of to Memphis and to apply it against the purchase of the boat. Kosmos did not gain anything by the transaction except that it got the boat paid for sooner; mill net did not enter into the matter (Tr. 12408-09).

Paragraph 206

1. Exception is taken to the failure to report that the evidence relating to the shipments made by Hercules for Vulcanite shows the following:

During the NRA code period the Vulcanite cement plant ceased to operate and engaged Hercules to furnish its requirements for all cement sales regardless of destina-

tion, with a minimum guarantee of 400,000 barrels. This contract had nothing to do with basing points or mill nets. These sales did not contemplate and had nothing to do with the length of the haul or the freight costs. All sales made to Vulcanite were made f.o.b. the Hercules plant at a price which Hercules was willing to accept in order to increase its output. Hercules has not made any shipments of Standard Portland cement for any cement manufacturer other than Vulcanite. There is no financial connection between Hercules and Vulcanite (Tr. 26272-73; 26280; 26318; 10568-70; Resp. Ex. 1106; see also exceptions to Paragraph 76, *supra*).

2. Exception is taken to the failure to report that the evidence concerning the shipments made by Medusa for the Castalia Company shows the following:

Because of the low price level and little demand in 1931, Castalia decided to discontinue manufacturing operations. By the time its clinker stock had all been ground, Castalia considered reopening the mill, but lacked sufficient capital. (Castalia's plant was not reopened at that time or at any time since.) (Com. Ex. 2804 A; Resp. Ex. 3439 A; Tr. 37766-67; 47673-76; 40114; 37766-67.)

In June 1932, Castalia, in order to take care of the sales which it had already made, commenced to purchase cement from Medusa. Castalia purchased this cement at a price f.o.b. Medusa's mill, pursuant to contract, and customers were billed direct by Castalia. The sales made by Medusa to Castalia were not based on considerations of the freight cost or basing points or mill nets. Castalia bought cement from Medusa as a jobber and paid the Ohio Retail Sales Tax on all its purchases (Tr. 47673-74; 40022; 47676; Com. Ex. 1877; Tr. 11342-43). In December 1937, Medusa discontinued selling cement to Castalia. During 1937 only 115 barrels were shipped by Medusa for Castalia (Tr. 40552; Resp. Ex. 3439 A; see also exceptions to Paragraph 15, *supra*).

3. Exception is taken to the statement that shipments by one mill for the account of the other were considered in Mallory's plans for allocating business because it implies

that there was some allocation of business by the respondents, or some of them, and any such implication is not supported by the evidence. The evidence concerning the Mallory statistics is set forth in exceptions to Paragraphs 173 and 212-219.

"Standardization of Product"

Paragraphs 207-211

1. Exception is taken, generally, to the statements in Paragraphs 207-211 on the ground that the pleadings do not raise any issue concerning the subject of standardization. The Complaint, Count I, Par. III, alleges:

> "Cement is a standard commodity made in standardized specifications not differing substantially among producers in quality except as between recognized and standardized grades thereof."

None of the answers of respondents took issue with this allegation.

2. Exception is taken to the assertions in Paragraph 207 because they imply that joint or cooperative action was taken by respondents, or some of them, regarding standardization and any such implication is not supported by the evidence.

3. Exception is taken to the failure to report the following in Paragraph 207:

There has been no connection between the Association of Portland Cement Manufacturers and The Cement Institute (Tr. 48494-95). The majority of the companies referred to in the references cited are non-respondents or are no longer in existence; the overwhelming majority of the respondent companies were not in existence at the time referred to (See exceptions to Paragraphs 7-81). Reception of the exhibits referred to was limited by the Trial Examiner to their consideration for the purpose of showing that the companies represented at the meeting *discussed* the question; counsel for the Commission conceded that

that is the only purpose for which they were offered (Tr. 38621-22).

4. Exception is taken to the failure to report in Paragraph 207 that the attitude and purpose of the cement manufacturers on the Committee which proposed standard specifications for Portland Cement to the American Society for Testing Materials in June, 1904, was shown by contemporaneous documentary evidence as follows:

> "These specifications which are before our body today have been prepared by a joint committee, composed of representatives of the American Society for Testing Materials, American Society of Civil Engineers, American Railway Engineering and Maintenance of Way Association, and the Association of Portland Cement Manufacturers, under Professor George F. Swain as chairman. It is the belief of the writer that when specifications for Portland Cement have become standardized in this country, as they will certainly become through the work of our Society, there will be no limit to the growth of the industry. The standardization of specifications will allow manufacturers to produce a more uniform and regular, and by the very fact of standardization, a cheaper article, and consumers will have an article of the best quality, thoroughly governed in its production, and one which will in the next period of our growth prove the cheapest and safest of building materials" (R. W. Lesly, Vice-President, A.S.T.M., and member of Committee on Standardization) (Resp. Ex. 411).

5. Exception is further taken to the failure to report that the evidence concerning the A.S.T.M., which was established by Commission's witnesses, as well as respondent's witnesses, is as follows:

The American Society for Testing Materials is a voluntary national technical society of professional engineers, testing experts, chemists, manufacturers, users and others interested in the properties of materials. It was organized for the purpose of promoting the knowledge of the materials of engineering, and the standardization of specifications and the methods of testing. It includes many of the government bureaus, such as the Bureau of Standards,

Bureau of Reclamation, War Department, and Treasury Department and has a membership of 4,000 (Resp. Ex. 417; Tr. 22777-78).

In the development of standards the committees of the A.S.T.M. function under definite regulations, governing their organization and procedure to insure adequate representation of producers, consumers and general interests, with the provision that producers may not predominate (Resp. Ex. 415; Tr. 22800).

Committee C-1 has never issued any specifications; it simply drafts proposed standards and submits them to the A.S.T.M. Each standard, after a tentative period in which the specification is tried out, is submitted to letter ballot vote of the entire Society membership and a two-thirds favorable vote of those voting is necessary before adoption, regardless of whether those members attended any conferences or committee meetings. Members are free to form their own conclusions and vote as they please (Tr. 26281; Resp. Ex. 417).

In addition to consumers and producers there are many scientific men on Committee C-1 who have no business relations with the producers and who vote on the problems that come before the committee. The men on Committee C-1 and the other technical committees of the A.S.T.M. are scientific, technically trained men and their classification as consumer, general interest or producer, hinges entirely upon employment and not on their knowledge (Tr. 48363; 26282; 22800). The consumer group has been active and the Committee has drafted, tested and adopted specifications to meet the desires of the consumer. The attendance at and actions of the Committee were all covered by minutes (Resp. Ex. 417; Tr. 48374; 48359-60; 48356).

6. Exception is taken to the failure to report that the evidence concerning the origin and early history of the Standard Specification for Portland Cement was as follows:

Prior to 1904 the product of many manufacturers was frequently not dependable, the customers only protection being the integrity of the manufacturer, and up to at least

1905, foreign cements commanded a premium over domestic cements because of better quality. Portland cement, however, was commercially standardized even prior to 1904. Manufacturers could not get a penny more than competitors for their brand (Tr. 26194-95; 42870-71; 7809; 22524; 38626; 22526-27; 23102; 38630; Resp. Ex. 411; Com. Exs. 2878 C-D).

In 1904 the engineering societies got together and wrote a standard specification for cement which was welcomed and adopted by most consumers and manufacturers. The idea of standardization was promoted and developed by the engineers and the consumers. There has never been any compulsion on any manufacturer to meet the standard specification. Practically however, all manufacturers testified that they must meet the quality requirements of the standard specification in order to satisfy the buyer.

After the adoption of a standard specification for Portland cement the quality of all brands meeting that specification became dependable, there was considerable development in the proportioning of the aggregates and in concrete work in general; and a considerable increase in the uses of Portland cement (Tr. 22774-75; 22777-79; 26194-95; see also exceptions to Paragraph 87, *supra*).

From 1875 to 1904, production of American Portland cement increased at the average rate of 700,000 barrels per year; in the corresponding period of time, from 1904 to 1928, production of American Portland cement rose at the average rate of 6,000,000 barrels per year (Resp. Exs. 3488 A-D; 2405; see also exceptions to Paragraph 84, *supra*).

The specifications adopted by the A.S.T.M. in 1904 have been revised many times, to wit, in 1908, 1909, 1916, 1921, 1927, 1930 and 1937. Each of these revisions from time to time has tended to be more strict and rigid in the requirements for manufacture (Resp. Exs. 406-17; Tr. 22795-98; 22830).

7. Exception is further taken to the failure to report that Commission's witness, P. H. Bates, of the National Bureau of Standards, testified to the following:

The War Department, itself, standardized its specifications about 1901; it was about the time that the Bureau of

Standards was organized that the A.S.T.M. undertook to standardize specifications for cement (Tr. 48447-48).

8. Exception is taken to the assertions in Paragraph 208 because they imply that The Cement Institute has been connected with the A.S.C.E., the National Bureau of Standards or the A.S.T.M., or that it engaged in activity regarding standardization, such implication is not supported by the evidence.

9. Exception is taken to the quotation in Paragraph 208 because it is inaccurate and misleading. The reference cited actually reads as follows:

> "Due largely to the activity of the Bureau of Standards and other Bureaus of the United States Government, the benefit to all concerned, of standardization, is generally recognized. Portland Cement was one of the first important commodities for which a generally accepted standard specification was developed and today practically all Portland Cement is manufactured, sold and used, under the uniform Standard Specifications of the United States Government, the American Society for Testing Materials, and the American Standards Association."
>
> "Freak and unreasonable specifications increase costs not only of manufacturer but of dealer and user as well; they also tend to destroy confidence in a standard specification, and, not being in the public interest, should be discouraged."

10. Exception is taken to the assertion in Paragraph 208 that "some cements are superior in many respects to others which were regarded as standard" on the grounds that it is vague and indefinite, it misstates the references cited and is not supported by the evidence, which shows the following:

All standard Portland cement, to be marketable, must meet the minimum requirements of the standard specifications (Tr. 26604; 26281; 26297). The first standard specifications called for a seven-day tensile strength requirement of from 150 to 200 pounds per square inch, and the fineness requirement provided that 75 per cent should pass the "200-mesh seive". In order to allow a safe margin and

to take care of the personal equation in laboratory testing procedure, manufacturers have always had to allow a margin of about 50 pounds per square inch above the minimum specified tensile strength. Subsequently, the standard specification was revised several times and the tensile strength requirements were increased and made more rigid. In 1930 the minimum seven-day tensile strength requirement was further increased to 275 pounds per square inch, which rendered the fineness requirement nugatory since any cement that would meet the tensile strength requirement, preforce, was bound to have the necessary fineness (Tr. 22863; 22780; 26292-94; 22907-08; Resp. Exs. 406-17). Commission's witnesses conceded that in recent years practically all of the standard Portland cement manufactured passes through the "200-mesh" sieve and the use of this screen is no longer adequate to measure the size of the particles (Tr. 48445). Therefore, in 1937, the A.S.T.M. dropped the "200-mesh" requirement and set up a new standard of fineness determination, by which the specific surface of the particles of cement are measured by means of the turbidimeter. State highway laboratories, likewise, have dropped the "200-mesh" requirement as a criterion of fineness and have adopted the surface area test (Tr. 22998; Resp. Ex. 417). The U. S. Government Department have, likewise adopted this method of determination of the fineness of cement effective July 15, 1937 (Resp. Exs. 423; 1355).

Manufacturers, individually, make periodic tests of samples of competitors' brands in order to make sure that their product is up to competitors' standards of quality. Special tests of competitors' brands are made upon receipt of complaints or claims concerning quality from customers and salesmen. None of these tests have disclosed any cement that did not exceed the minimum requirements of the Standard specification. Some manufacturers have been at a temporary disadvantage, competitively, by reason of small transitory differences, and, upon discovering the fact, immediately raised their quality to meet the competition (Tr. 42184; 36479; 37482-86; 22773; 36478; 41608). This has resulted in raising the quality of all brands of standard Portland cement (Tr. 29036; 27623; 34832;

36752). The inspection and testing of standard Portland cement is far more rigid today than it was when the first standard specifications were issued (See Resp. Exs. 415; 419; 421; 422-23; Tr. 22666).

11. Exception is taken to the failure to report that increased requirements and improvements in the quality of standard Portland cement have tended to restrict the output of cement plants generally; labor requirements have increased because of the additional processing which is required, and costs of production have increased greatly. The average rate of pay for labor in 1937 was four times what it was in 1913. Labor costs during the same period doubled. Labor costs during the period from 1928 to 1938 increased about 30 per cent on a per barrel basis. Fuel costs in 1937 were about 80 per cent higher than they were in 1913 and the consumption of power in the daily operations of cement plants in 1937 was 50 per cent greater than it was in 1913 (Tr. 22943; 22728; 28479; 33766; 26321; 22647-48; 22732; 22779).

12. Exception is taken to the failure to report in Paragraph 208 that the general tendency through the years has been toward finer grinding of materials throughout the processes of manufacture. This has been made possible through modernization of equipment and new machinery (Tr. 48368; 26294-95; 26300; 22648).

13. Respondents offered to prove that the action taken, individually, by numerous respondent companies for the purpose of modernizing their plants, meeting quality competition and developing and promoting new and improved specifications required an average expenditure of about $250,000 to $275,000 per year during the ten years ending July 1, 1937 (Tr. 37321-23; 30484; 46886-87; 37181-82; 22633; 22582; 22710; 22715-16; 38738; 46888-89; 36803-04).

14. Exception is taken to the assertions in Paragraph 208 because they imply that one brand of standard Portland cement should command a greater or less price than other brands with which it is in competition by virtue of "individual characteristics" and any such implication is not supported by the evidence. A few cement pur-

chasers express a preference for one brand or another according to certain characteristics such as plasticity, workability, or quick drying. These qualities are indefinite, impalpable, haphazard, and often imaginary. They are not a matter of, and have nothing to do with, specifications. There is no substantial difference in the uniformity of quality of the output from the various mills of a given company (Tr. 22868; 22775).

Cement purchasers, generally demand a standard Portland cement that will meet the specifications. They are not interested in special characteristics or fancied qualities. If a preference is due any definite quality that is susceptible to physical or chemical determination, however, competitors vary the process of ingredients of their product to meet such preference.

The voluminous testimony of consumers as well as manufacturers, which was not contradicted or disputed, is that regardless of any preferences expressed by any buyer for one brand or another, no manufacturer has been able to command a premium in price for his standard Portland cement over any other brand (*e. g.*, see: Tr. 34421; 34859; also citations collected under Exception No. 3 of exceptions to Paragraphs 88-92, Sec. II). Government witnesses testified that they would not pay any more for any particular brand as long as all brands met the minimum requirements (Tr. 1737; 36752-96).

15. Exception is taken to the statement in Paragraph 208 that "the price of the various brands of cement is the same" because it misstates the evidence and is inaccurate (See exceptions to Paragraphs 88-93, *supra*).

16. Exception is taken to the statements in Paragraphs 205; 206; 208-211 which are concerned with "Incor", High-Early-Strength, or other special cements and different specifications which were stated by the Examiner to be "thoroughly and completely and absolutely irrelevant" and "not involved in this case" (Tr. 42230; 36728; see also Tr. 27353). Respondents proof on these subjects was rejected by the Trial Examiner (Tr. 27351; 42232).

17. Exception is taken to the assertions in Paragraphs 209 and 211, as well as in Paragraphs 208-211 generally

because they imply that the respondents, or some of them, have had an agreement or have taken concerted action to eliminate, hinder, or obstruct the manufacture of special specifications of cement other than standard Portland cement. There is no evidence to support any such implication, none is cited and the evidence is abundantly to the contrary (see citations below). It shows the following:

Cement manufacturers, individually, have met the individual requirements of consumers by furnishing many special varieties of cement. Some manufacturers, in 1937, were producing cements to meet sixteen different specifications, each of which must be stored separately, as compared with three specifications which were called for in 1926. An executive of one manufacturer testified that his company makes and has in storage thirty-one different kind of cement, including four separate government specifications (Resp. Exs. 2522-23; 1104-05; Tr. 26301; 27397; 35199; 27624). Special cements generally have been materially more expensive to manufacture and require costly and additional greater storage space (Tr. 26306; 27862; 26300-02; 22880; 22779; 28476) (See also exceptions to Paragraph 87, *supra*).

18. Exception is taken to the failure to report in Paragraph 209 that the manufacture of high early strength cement requires a composition entirely different from the manufacture of standard Portland cement. It is double burned and the slower feed and slower kiln speed reduces kiln output and raises unit labor requirements. It is ground very much finer and is standardized at a much higher level of specification than Standard Portland cement (Com. Ex. 1355; Resp. Ex. 45; Tr. 27349).

All respondents do not manufacture high early strength cement. Those who do exceed the specification do so by an amount sufficient to meet it with safe margin (Tr. 41608; 28475; 36839).

The adoption by the A.S.T.M. of a standard specification for high early strength cement was in response to consumer demand (Tr. 48360).

19. Exception is taken to the statement in Paragraph 210 that "the P.C.A. and members of the industry were predominating influences in establishing the prevailing standards on the ground that it is contrary to the evidence. Exception is taken to failure to report the following evidence:

Early in President Taft's administration an executive order was issued compelling all Government agencies to buy cement according to one standard (Resp. Exs. 418; 419).

The background reasons for this executive order were set forth in the Circular issued by the United States Bureau of Standards July 1, 1913 as follows:

> "In June, 1911, the Secretary of the Department of Commerce and Labor arranged, through the Secretaries of the various departments, for a conference of Government engineers for the purpose of unifying the specifications for Portland cement used by the United States Government: At this conference a committee was appointed to consider existing specifications and to recommend a single specification for Portland cement to be used by all departments of the Government.
>
> "After an extended series of meetings of this committee, at which careful consideration was given to representative specifications for Portland cement, as well as to all available data on methods of tests, a tentative specification was developed, which was reported to the departmental conference at a general meeting held July 20, 1911.
>
> "In view of the desirability of agreement between the specifications in use by the public and those adopted by the Government, the committee was instructed by the conference to confer with representative consumers and manufacturers as well as the special committees of the national engineering societies more directly interested in the subject of cement specifications. As a result the tentative specifications first reported by the departmental committee were modified slightly, until substantial agreement was reached on practically all points except the methods of determining the normal consistency and time of setting, and the following specifications were unanimously adopted by the departmental conference at the meeting held February 13, 1912.

"It was recognized that no specification can be considered final, but must be subject to revision from time to time as occasion requires, and provision will be made for such revision by the various Government departments, all of which have adopted the specification as recommended by the conference.

S. W. Stratton,
Director.

Approved:

A. L. Thurman,
Acting Secretary."

(Resp. Ex. 418).

All of the members of the Committee appointed to draft the specifications referred to above, including P. H. Bates of the United States Bureau of Standards, as well as the 19 men attending the Department Conference were heads of, or connected with, governmental bureau. None of them were connected in any way with any cement manufacturer (Tr. 22854; 22856).

In 1916, following a joint conference between the Bureau of Standard, the A.S.T.M. and the Society of Civil Engineers, the government issued a revision of the specifications of 1912, the result of which was a complete conformance of the government specifications with those of the A.S.T.M. (Resp. Exs. 408-10; 419).

The Bureau of Standards, in its circular issued January 18, 1917, stated as follows:

"On July 30, 1912, the Departmental Conference was reconvened. Many meetings have been held by the departmental committee and conferences secured with committees of engineering societies resulting after four years of work in agreement on a single standard specification which has been adopted for use by the recognized engineering societies as well as by the Government."

No cement manufacturer was represented or had any part in any of the committees which met at this joint conference, or in the personnel of the Departmental Conferences. The members participating, including P. H.

Bates, were all connected with governmental bureaus (Resp. Exs. 418; 419; Tr. 22854; 22856).

20. Exception is taken to the failure to report that although the Government specifications were for use in the purchase of cement by Government departments, there has always been a tendency for the government specifications to be adopted by other consumers and to come into general use, and the individual cement manufacturer tended to conform his product to them (Tr. 22853).

21. Exception is taken to the failure to report that the Bureau of Standards issued further revisions of its specifications in 1927, 1930 and 1936, which conformed to revisions made by the A.S.T.M. in its specifications (Tr. 22863).

22. Exception is taken to the failure to report that the methods of sampling, inspection and testing of cement which accompany government and A.S.T.M. specifications have been under constant and continual improvement (Tr. 41824; 22894; Resp. Ex. 431). The National Bureau of Standards instituted regulations governing the testing of cement in order:

> "to show the individual manufacturer how the cement could be made more standard and uniform; and to insure that cement purchased by the Government would be properly tested."

The Bureau then established a policy of inspecting manufacturers' cement testing laboratories every 18 months for that purpose (Tr. 26291). Documentary evidence to this effect was offered by respondents and rejected by the Examiner (Resp. Exs. 1101-02 for id.).

23. Exception is taken to the assertions in Paragraph 210 because they imply that there is an agreement between the respondents or some of them, with respect to standardization and the prices at which they sell their cement. There is no evidence to support any such implication and the statements misrepresent the references cited.

24. Exception is taken to the statement that "the standardizing process began in 1904". This is contrary to the evidence (See Exception No. 6, *supra*).

25. Exception is taken to the statements made in Paragraph 210 and in Paragraph 211, on the following grounds: There is no connection between the P.C.A. and The Cement Institute. The Committee on Specifications referred to in these Paragraphs and the references cited, was a committee of the P.C.A. and not of The Cement Institute. There is no showing that the P.C.A. is or ever was connected with subject matter of this proceeding in any way and the Trial Examiner so stated (Tr. 13677).

There is no evidence to show whether the claims of excellence asserted by some of the companies are well founded or were well founded at the time they were made, or that they remained well founded for any sensible length of time. (See Tr. 13678-79).

26. Exception is taken to the failure to report in Paragraphs 210 and 211 that the evidence concerning the function, purpose and activities of the Committee on Cement Specifications of the P.C.A. was that it cooperated with the federal government and with the consuming public generally in scientific research designed to investigate, test and develop new or improved specifications (Resp. Exs. 2716 A-B; Tr. 36043; 36556-60).

27. Exception is taken to Paragraph 211 in its entirety on the ground that it is not supported by the evidence.

28. Exception is taken to the failure to report in Paragraph 211 that the evidence concerning quality advertising by the Ash Grove Company referred to in Paragraph 211 was as follows:

The President of Ash Grove testified that none of Ash Grove's competitors had ever made objections to him about the forms of advertising used by his company and that so far as he knew no comments had been made about his advertising by any competitor or by any member of the P.C.A. (Tr. 13691). He testified further that no representative of the Portland Cement Association ever took up with him the matter of advertising the quality of Ash Grove's standard cement, and he denied that Ash Grove discontinued its policy or practice in respect to quality ad-

vertising in 1930 or thereafter. The President of Ash Grove further testified that the company has consistently advertised and still does advertise on a quality basis and produced current samples of such advertising at the request of Commission Counsel (Tr. 13675-76; 13678-79; 13736-37; 13751; Com. Ex. 2436).

29. Exception is taken to the failure to report in Paragraph 211 other evidence that respondents advertise on a quality basis and print advertisements proclaiming the superiority of their cement (Tr. 27926); and there is no evidence that any respondent refrained from advertising the quality of its product or seeking to gain business through quality competition.

30. Respondents were prevented by the Examiner from showing that the government opposed and still opposes the use of laboratory test reports or results for advertising or sales promotion (Resp. Exs. 1101-02 for id.; Tr. 26291).

"Production and Shipment Statistics"

Paragraphs 212-219

1. Exception is taken to the failure in Paragraphs 212 to 219 to report the following:

There is no charge in the complaint concerning statistics, but evidence was received to show that The Cement Institute compiled and distributed statistics as to production, shipments and stocks on hand. This service was fashioned after and similar in form and substance to that rendered by the Cement Manufacturers Protective Association (Tr. 24900; 26973-74). The Supreme Court in the *Old Cement* case (268 U. S. 588, 600) approved this service and described it as follows:

> "Each member of the Association, in addition to the reports on specific job contracts already referred to, sends to the Association a monthly statement of its production of clinker and ground cement, shipments and stock on hand for the past month

and for the corresponding periods of the previous year. These were compiled and distributed to members without any change or comment. In addition, semi-monthly statements of shipments were also received and likewise distributed. Each member of the Association was thus given full information as to the available supply of cement and by whom it was held."

There was no evidence that the statistical service of the Institute affected prices or that production or shipments were improperly curtailed or affected by it. Executives of many respondents testified fully regarding their use of Institute statistics and that there has been no agreement or understanding as to the use of the statistics furnished by the Institute or to allocate or share business either through the use of such statistics or otherwise (Tr. 35922; 37710; 38756-57; 40073-74; 32219; 46840-41; 29160-61; 46733-34; 37182-84; 39591-92; 36492-93; 34217-18; 39148; 31405; 36036-37. See also Com. Exs. 2895 A-D; Exception No. 8, *infra*, and exceptions to Paragraph 7-81, *supra*). There is no evidence to the contrary. The evidence also shows that large stocks of cement have always been available since at least 1927 (Resp. Ex. 3508).

2. The documents referred to in Paragraphs 212-219 as Com. Exs. 808 2Z-3A; 808 3H; 808 3J-3K; 808 3R-3W; 821 2H-2i, were never offered or received in evidence. Com. Ex. 831 J has no connection whatever with statistics. There is no exhibit marked Com. Ex. 670 6H.

3. Exception is taken to the failure to report that there is no evidence that the purported December 1904 report of the Executive Committee of the A.A.P.C.M. was ever acted upon (See also exceptions to Paragraph 176, *supra*).

4. Exception is taken to Paragraph 213 in its entirety because it is not supported by any evidence.

5. Exception is taken to the failure to report in Paragraph 214 that there is no evidence that the activities referred to had any effect on prices and to the further failure to report that prices declined in 1911 at all points. For ex-

ample, the prices around Pittsburgh reflected the following successively reduced bases in 1911:

Date	*Lehigh Valley*	*Mitchell*
Mar. 2, 1911	$.70	
Apr. 17, 1911	.65	
June 13, 1911	.60	
June 27, 1911	.55	
July 13, 1911	.55	$.75
Aug. 30, 1911	.55	.80
Nov. 8, 1911	.45	.70
Nov. 9, 1911		.65
Feb. 12, 1912	.50	
Mar. 28, 1912	.50	.70
Apr. 2, 1912	.55	.75
June 5, 1912	.55	.80

(Tr. 35882-85; Resp. Ex. 2609).

6. Exception is also taken to the implication that joint or cooperative action was taken on the 1911 report to the A.A.P.C.M. on the ground that it is not supported by any evidence.

7. Exception is taken to the failure in Paragraph 215 to report the following:

The C.M.P.A. was disbanded in 1924 (Tr. 24798-800). Its statistical service disclosed the identity of each mill in connection with statistics reported. The dissemination of statistics did not affect or concern prices (See 268 U. S., 588).

The respondents who are not listed in Paragraph 215 were not subscribers to Mallory's statistical service. Those companies which did subscribe to Mallory's statistical service did so for only a part of the period and not for the whole period from July 1926 to August 1935 (Com. Exs. 3008 A-C). The testimony showed that Mallory's service did not concern itself with current or future prices of cement (Tr. 38756-57; 35922; 37710; 40073-74).

8. Exception is taken to the failure to report the following in Paragraph 216:

Executives of many respondents testified that there has never been any agreement or understanding to curtail pro-

duction through the Institute or otherwise (Tr. 38691; 30484; 36834-35; 38687; 40085; 40098; 36036-37; 34218; 34299; 34310; 37771; 37728; 28722; 29160-61; 29206-07; 32219; 47890; 36107-08; 29160-61; 36977; 31405; 39036; 32219; 46733-34; 30483-84; 36036). They testified further that there has been no agreement or understanding to rate the capacity of mills at three months highest consecutive run or otherwise and that the Institute had never rated the capacity of cement mills (Tr. 30483-84; 37182-85; 29161; 23918-20; 28482; 36036-37; 34217-18).

The NRA Cement Code as approved by the President of the United States provided:

> "The Board (of Trustees of The Cement Institute) is hereby authorized to formulate a plan or plans . . . for the equitable allocation of available business among all members of the industry or among members of the industry operating in one or more District . . ." (Com. Ex. 557, pp. 333-34).

The plan was then to be submitted to the Code Administrator.

Pursuant to the provisions of the Code various persons, including Mr. Mallory, submitted material and even outlines of plans "for the equitable allocation of available business."

Many companies opposed any plan for allocating business on principle (Tr. 29207-08; 27392-93; 39036-37). Others specifically opposed the several proposed plans (Tr. 30754; 26250; 29484-85; 37191-93; 42220; 36470-71; Com. Exs. 542; 597 A-D; 818 4B-4F; 637 G-J; 562 8L-8M; 426 o-Q).

No plan for allocation was ever approved by respondents or submitted by the Code Authority to the NRA (See exceptions and citations to Pargraph 173, *supra*). Commission Counsel conceded that no plan for allocating business under the NRA code ever went into effect (Tr. 37192-93). The Institute never had any connection with the subject of allocating business except pursuant to the NRA Code. Respondents never reduced output to 70 per cent of ca-

pacity in 1929 or at any other time and executives of respondents testified that there never was any agreement or understanding to allocate business at any time (Tr. 30966; 28481; 37184; 26269-70; 27392-95; 33792; 33789-90; 17043-44; 47574-75; 34569; 38790; 29206-08; 17091-92; 29484-86; 37182-84; 37191-93; 36468; 36470-71; 31682; 27827; 27830; 48100; 39860; 46735-36; 41607-08; 31277; 39036-37; 40098; 42220-21; 39592-93; 41961; 34310; 41541; 32219; 46733-34; 46840-41; 47890; 36107-08 29160-61; 30483-84; 36492-93; 34218; 37598-60; 29161; 39418).

9. Exception is taken to the failure in Paragraph 217 to report that the Bureau of Mines took several months to get out its reports and cement companies received them quite late, in some instances too late to be of any use or interest (Tr. 36822-23; 38757; 37710; 40074).

10. Exception is taken to the failure to report the following in Paragraph 218:

Companies desiring not to submit their individual figures to the Institute were not obliged to do so (Tr. 16823-25; Com. Exs. 1025i, M-N).

The advantages of the Institute statistical service were that they afforded more accurate statements of shipments than salesmen were able to obtain and that they could be distributed without the delay that attended the issuance of the Bureau of Mines figures (Tr. 17235; 35921; 37710; 40074; 38757; 36822-23; 16808; 26985-87).

11. Exception is taken to the statement partly quoted in Paragraph 218. It is inaccurate and misleading unless it is pointed out that it ends with the words, "since they get the facts".

12. Exception is taken to the implication that the public or consumers asked for the Institute statistical information and were refused, on the ground that it is not supported by the evidence.

13. Exception is taken to the failure in Paragraph 219 to report that the figures quoted for the years 1906 to 1911 inclusive are not figures for the entire year in any instance,

but cover only the period from January 1 to May 31, of each year (Com. Exs. 3235-Z95).

14. Exception is taken to the use in Paragraph 219 of the inaccurate figure of .5 per cent. This was Mallory's offhand estimate (Tr. 17496). Exception is further taken to the failure to report the following correct figures:

	Production	*Shipments*	*Percentage of Prod. over Ship.*
1930	161,197,228	159,059,334	+1.3
1931	125,429,071	127,150,534	—1.4
1932	76,740,945	80,843,187	—5.3
1933	63,473,189	64,282,756	—1.3
1934	77,747,765	75,901,279	+2.4
1935	76,741,570	75,232,917	+2.0
1936	112,649,782	112,849,979	—0.2
1937	116,174,708	113,804,782	+2.0

(Resp. Exs. 3488; 3775-81).

15. Exception is further taken to the failure in Paragraph 219 to report the following:

There is no official record of shipments for the period 1906 to 1911, as the Bureau of Mines first started to publish shipment figures about 1912. A comparison of the first five months of 1906 to 1911 with the same months of 1930 to 1937, would show:

	Production	*Shipments*	*Percentage of Prod. over Ship.*
1930	58,655,000	51,357,000	+12.4
1931	46,015,000	42,342,000	+ 8.0
1932	26,235,000	25,040,009	+ 4.6
1933	19,864,000	19,948,000	— 0.4
1934	28,302,000	26,624,000	+ 5.9
1935	24,912,000	24,301,000	+ 2.5
1936	32,152,000	34,702,000	— 7.9
1937	42,932,000	39,893,000	+ 7.1

(Resp. Exs. 3502-07; 3559).

For example, one company (*Petoskey*) with figures on production and sales (or shipments) for the entire year shows a wide variation as follows:

	Production	*Sales*	*Percentage of Prod. over Ship.*
1928	1,411,902	1,552,146	— 9.9
1929	1,465,023	1,383,301	+ 5.6
1930	1,326,446	1,177,080	+11.3
1931	899,125	1,080,092	—20.1
1932	552,450	683,289	—23.7
1933	669,600	520,797	+22.2
1934	567,500	686,122	—20.9
1935	814,500	652,550	+19.9
1936	1,150,650	1,258,514	— 9.4
1937	1,221,590	1,099,769	+10.0

(Resp. Ex. 2934).

15. Exception is further taken to the failure to report in Paragraph 219 that Com. Ex. 821 E, which is quoted from twice in Paragraph 219 was written April 5, 1934 and was an argument favoring one of the NRA Code plans for sharing available business, none of which were ever adopted (Com. Exs. 821 E-J; see also Exception No. 8; *supra*).

17. Exception is further taken to the failure in Paragraph 219 to report the following: There was never a time when at least 5,000,000 barrels of cement were not on hand at the Lehigh Valley and the eastern New York State mills (Com. Exs. 2918; 2894; 3508). In 1936, the days supply of cement on hand varied from a low of 38 days in Texas in July to a high of 175 days in Michigan in February. In 1935 the days supply varied from 63 in California in January to 181 in Michigan in February (Com. Ex. 2894).

"Secretive Methods"

Paragraphs 220-223

1. Exception is taken to the heading "Secretive Methods" as a conclusion implying a course of practice among respondents not supported by the evidence. Exception is further taken to the failure to report that there was no

evidence regarding the subject of Paragraph 220 as to respondents other than those specifically mentioned therein.

2. Exception is taken to the failure to report in Paragraph 220 the following testimony of Mr. F. R. Johnson, President of the Aetna Company (Tr. 1090):

> "Q. Mr. Johnson, when Miss Fowley was on the stand, she testified, I believe, that she had received letters from Mr. Johnson which were marked 'Please tear this up'. What have you to say to that if anything? A. I sent no letters of that type, to tear them up.
>
> Q. Did you ever write such a letter as that in your life? A. No, sir. I don't do that in my business. That is not my business way of doing things."

(See also; Tr. 30173-81).

3. Exception is taken to the statement that such communications were "sent out by Aetna" because it is contrary to the evidence (Tr. 781; 1090).

4. Exception is taken to the failure to report in Paragraph 220 the following testimony of Mr. F. R. Johnson, President of Aetna concerning that company (Tr. 1053):

> "Q. Did you consider it a proper business policy for competitors to acquaint each other in that way, with the intimate details of each other's business? A. I consider it perfectly proper for any one manufacturer to call up a brother manufacturer, or he may be a competitor, probably, and say, 'Did you sell this or that in this particular market at a particular price? We have heard that you did. Now if that is true we would like to know it, and if it is not we would like to know it, because then, of course, if it is sold at a lower figure we will have to meet it.'
>
> * * *
>
> A. (Continuing) 'If you did not then it is a salesman's loose talk and I shall pay no attention to it.'
>
> Q. Does your reply extend to a competitors informing each other in advance what their prices are going to be? A. No, sir, absolutely not."

5. Exception is taken to the unsupported inference of impropriety in the statement in Paragraph 220: "Letters

were taken out of files at various times" and the failure to report that the evidence concerning this was merely the usual periodical clearing of inactive or old files pursued by any business organization (Tr. 1050; 1090; 1902 in conjunction with 1921; Tr. 30173-81).

6. Exception is taken to the assertion in Paragraph 220 that "many telephone messages between Mr. Calvin, of Aetna, and competitors related to prices and bids", because it is contrary to the evidence (Tr. 30183-84; 30234-35).

7. Exception is taken to the failure to report that the files of the Kansas City Cement Bureau were thrown away because the Bureau was abandoned when it was taken over by the Institute in 1930 (Tr. 14420 cited).

8. Exception is taken to the failure to report in connection with testimony cited in Paragraph 220 (Tr. 13568) that it was Aetna's practice at that time to file all correspondence, alphabetically, in one file (Tr. 30180-81).

9. Exception is taken to the failure to report that the witness Elsie Eaves (testimony cited, Paragraph 220, Tr. 20429) was an editor of the Engineering News Record, a magazine; that she was not and never has been employed by any respondent and that her testimony which is cited had nothing to do with the activity of any respondent.

10. Exception is taken to the failure to report in Paragraph 221 that J. P. Neylan was not an executive of Lone Star and that his letter was contrary to the policy and practice of the company (Tr. 33263-66).

11. Exception is taken to the failure to report in Paragraph 222 the evidence showing that there was no agreement or understanding between Penn-Dixie and any competitor regarding the Ironton base (Tr. 23127-31; 33090). Respondents were foreclosed from showing by other contemporary documents that there could have been no such understanding (Resp. Exs. for id. 2373 A, B; Tr. 33084-90).

12. Exception is taken to the failure to report in Paragraph 223, that the denial by Alpha was supported and confirmed by contemporaneous documentary evidence (Tr.

25045-49; Resp. Exs. 817; 818; 819; Com. Exs. 1098; 3103; Tr. 25041-44); and exception is taken to the further failure to report that the statement was denied by the executive of Lehigh who handled the transaction, and that that denial also was corroborated by contemporaneous documentary evidence (Tr. 27049-54; Resp. Ex. 1353; Com. Ex. 385 B-C).

13. Exception is taken to the failure to report in Paragraph 223 that the purpose of avoiding "the implication" that the Institute had any authority in the control of contract obligations was that the Institute, in fact, had no such authority and for the failure to report the evidence in support thereof (Tr. 4203-04; 16756-57; 16782-87; 36497; 36500; 37240-41; Resp. Ex. 2417 A).

"The Price Issue"

Paragraph 224

1. Exception is taken to the failure to report in Paragraph 224 that the evidence concerning price (when cement is sold delivered to the customer) is as follows:

Buyers customarily request and are quoted delivered prices. They always compare the cost of cement at the point of delivery, regardless of the method of quotation (See exceptions to Paragraphs 88-92, and 130-38, *supra*).

When prices are quoted on a delivered basis, there is a custom in the cement trade of considering price to be the total amount paid by the buyer including transportation charges, if any. In quoting prices to dealers and contractors, all manufacturers (including non-respondents) treat the price as the amount of money to be paid by the buyer for the goods laid down at the point of delivery (See for example, Resp. Ex. 438, dated 1905, or any subsequent quotation; Tr. 30187; 36851-52; 38705-06; 28745; see also exceptions to Paragraphs 7-81, *supra*).

2. Exception is taken to the implication in sub-paragraph (b) of Paragraph 224 that all cement is invoiced with the freight deducted. This is contrary to the evidence which

shows that a considerable portion of all the cement sold is and has for many years been invoiced and sold without any deduction of freight (Com. Exs. 2789 A-M; 2283; 2286; 2293; 2294; 2633; 2634; 2635; 2636; 2637; 2638; 2639; 2640; 2641; 2663; 2665; 2667; 2671; 2675; 2693; 2713; 2726; 2736; 2738; 2740; 2748; 2750; 2703; 2802; 2679(1); 2683(1); 2732(1); 2742(1); 2697(34); 2758(1); 2778(1); Tr. 37105; 37161-62; 37157-58; 46471).

3. Exception is taken to the implication in sub-paragraph (c) of Paragraph 224 that sellers refuse to protect purchasers from damage in transit. This is contrary to the evidence. Exception is further taken to the failure to report that most cement manufacturers have for many years handled claims with transportation agencies for damages in transit and over-charges (Tr. 46817-19; 46794; 41648-55; Resp. Exs. 2730, p. 1122; 1123; 1124; 1125; 1126; 1232; 521; 597; 2609 B, D, F, H, J, *et seq.* inc., Z144; 2088; 3457; 3458; 3157 E; 3411 D, G; 2358 A-o; 1694; 3013; 2907 E, G-Z9; 3042 F, H, V Z8; 3368; 1696; 1859; 1644 B; 617; 595; 1695; 1643 B; 660; Com. Exs. 2671; 2665; 2669; 2683; 2691; 2701; 2705; 2713; 2724; 2736; 2738; 2746; 2748; 2750). A few companies had a provision in their quotation forms that the risk of loss in transit was to be borne by the buyer. The purpose was to encourage customers to use more care in handling paper sacks and thus to minimize claims for damages. In practice, however, the seller always bore the loss whether the railroads made good or not (Tr. 46817-19; 24656; 46794; 32500-01; 34268-69; Resp. Exs. 3788 Q-7).

The Trial Examiner rejected a considerable amount of respondents' proof relating to this subject (Resp. Exs. for id.: 3372; 3373; 3374; 3429).

4. Exception is taken to the implication in Paragraph 224 that purchasers of cement did not ordinarily return paid freight bills. This implication and the citation in support thereof applies only to a single respondent. Exception is further taken to the failure to report the following evidence regarding the other respondents:

Many companies have for many years shown on their books of account the total purchase price including freight.

They enter a credit to the customer's account when he returns the paid freight bill (Resp. Exs. 2790; 2791; 2792; 2788; 2789; 3576; Tr. 37091-92; 37096-99; 37153-54; 46469; 3240). Many companies require dealers to submit paid freight bills in order to receive credit for having paid the freight. This practice has been going on for well over 20 years (Tr. 46783; 46788-89; 47134-36; Resp. Exs. 439; 440; 442; 444; 445; 451; 452; 453; 454; 656; 1248; 3411 A; 2358 A; 3627 A-B; 2907 A; Com. Exs. 2726; 2748; 2750; 2283; 2286; 2293; 2294; 2307; 2308; 2295; 2665; 2667; 2671; 2673; 2736; 2697; 2752; 2283; 2286; 2293).

There was expert testimony to the effect that it was sound accounting practice for a company selling at delivered prices to include on its books of account only the mill net (delivered price minus freight) (Tr. 48048).

5. The undisputed evidence shows that the universal custom in the cement industry for many years has been that on delivered price sales buyers pay the freight for the account of the seller (Tr. 37044; 37105; 42195; 32402; 32383; 37105-06; Resp. Exs. 2752; 2358; 1849; 2907 D, F; 3042 P, Z8, Z4, Z12; 1228 B; 617; 3018 B; 3157 R; 2088 A-B; 2275; 2277; 2278; 3460 B; 1221 A-B; 1286; 3627 B; 2700 A-B; 3411 D-E; 1696 A-B; 3368 B; 2274; 660; 596; Com. Exs. 557, p. 347; 560, p. 27; 1295 F; 3087 D; 3081 C; Resp. Exs. 597; 598; 611; 599; and many others (See also invoices for April 1938—Com. Exs. 2677; 2713).

Further evidence to the same effect was rejected by the Trial Examiner (Resp. Exs. for id.: 2645; 2218 E, K, T; 2906; 1827; 3152; 3020; 2907-Z7).

The Examiner also rejected evidence offered by respondents to show where title passes on commercial cement sales (Resp. Exs. for id.: 2955-64).

On sales to the United States Government the performance bond required by the government is executed on the basis of the price delivered to point of use (Resp. Exs. 2329 A-C).

6. Exception is taken to the failure to report the following in Paragraph 224:

Whenever the cash discount on cement was expressed as a percentage it represented a percentage of the total

delivered cost including freight (Resp. Exs. 438; 435; 369 A).

Cement manufacturers have always reserved control over the cement until it reaches destination. They control the routing and reserve the right to divert a shipment in transit (See Resp. Exs. 544; 545; 3460 B; 1221; Tr. 30573; 32501).

7. Exception is taken to the unsupported implication in subparagraph (d) of Paragraph 224 that some vendors did not set up a method of handling claims for losses in transit and to the failure to report that contract forms usually provide that buyers should secure notation of station agent of loss or damage on bill of lading (See citations, *supra*).

8. Exception is taken to the general statement in subparagraph (f) of Paragraph 224 that dealers are in competition with dealers at other points on the ground that it is not supported by the evidence, except as to specific areas such as metropolitan or similar areas of congested population; and in the narrow zones around some mills, where switching rates apply instead of a line haul rate (See citations in report; see also regarding special pricing conditions in such areas, exceptions to Paragraphs 88-92, *supra*).

9. Exception is taken to the vague, ambiguous and indefinite statement in Paragraph 224 implying that cooperation or any other steps were taken to prevent competition between dealers in different towns on the ground that it is not supported by the evidence.

10. Exception is taken to the implication in subparagraph (g) of Paragraph 224 that after the enactment of the Robinson-Patman Act the respondents changed their practice concerning the payment of freight on the grounds that since at least 1929 many respondents as a condition of sale, required the "buyer" to pay freight "for the account of the seller", that the contract forms approved by the President as part of the NRA Cement Code (Com. Ex. 557) contained this provision and that it continued to be a customary sale provision (See citations to Exception No. 5, *supra*).

11. Exception is taken to the implication in subparagraph (h) of Paragraph 224 that respondents have only prepaid freight since this case began, on the ground that for many years (and prior to the complaint) some respondents have prepaid the freight on most of their shipments (Tr. 37104-05; 37158-64; Resp. Exs. 2792 A-Z2); other sellers have not done so because of the expense and large amount of capital involved. Exception is also taken to the statement in subparagraph (h) since it relates to matters occurring subsequent to the date of the complaint. Moreover respondents were curtailed in their proof relating thereto (Tr. 41619-20; 37104; Resp. Exs. 3375 A-Q for id.).

12. For exceptions to the reference to the Compendium "forbidding" such a practice, see exceptions to Paragraph 1, *supra.*

13. Exception is taken to the inference of collusion contained in Paragraph 224 which is not supported by the evidence.

14. Exception is taken to the reference to matters occurring subsequent to the period covered by the complaint, on the ground that respondents were foreclosed from adducing evidence as to matters occurring since the date of the complaint (See Com. Exs. 2663; 2673; 2677; Tr. 29863; 39538-40).

15. The following citations in Paragraph 224 have nothing to do with the subject matter: Tr. 2340; Resp. Exs. 2733; 202 W; Tr. 6734; 38240; Resp. Exs. 2755 A; Tr. 35277. Tr. 39540 refers to evidence which was stricken (Tr. 39600).

"Expert Economic Testimony"

Paragraph 225

1. Exception is taken to the report in Paragraph 225 that

> "Many able and interesting economists, acknowledged authorities in their fields, testified on the eco-

nomic aspects of the basing point system, marketing methods, competition and public interest affected by the economic aspects of practices employed by members of the cement industry."

insofar as this finding relates to the economists for the commission upon each of the following grounds:

(a) only one of the Commission's economists testified on all of the subject matters enumerated in the finding;

(b) Drs. Duddy and Hibbard, were qualified only as experts in the field of agricultural marketing, and did not purport to testify as to any of the subject matters enumerated in the Trial Examiner's statement, and Dr. Nourse testified only as to identity of quotations as contrasted with identity of actual prices.

Paragraph 226

1. Exception is taken to the statement that the Commission's expert testimony is to the effect

"that the basing-point system substantially as alleged in the complaint is not what the science of economy or these economic experts would recognize as a competitive system".

upon each of the following grounds:

(a) the transcript references do not support the statement and it is not supported by the evidence;

(b) the transcript references include answers to improper questions, including questions requiring an expert witness to pass upon the fundamental issue of collusion and combination—not a proper question for an expert witness to pass upon, since it is the ultimate issue for determination by the Commission—and to these questions objections were duly made and overruled and exceptions noted (Tr. 15641-42; 17755-58).

2. Exception is taken to the statement that Commission's expert testimony is to the effect

> "that, according to any business behavior observed by the economists, such a system could not arise spontaneously as a result of competitive forces, but certain of its elements would have to be planned and some disciplinary machinery would be required, such as the practice of establishing a lower basing-point at another mill".

upon each of the following grounds, viz.:

(a) the statement is not supported by the transcript reference or by the record;

(b) the testimony cited includes improper questions and irresponsive answers to which objections and a motion to strike were duly made and overruled and exceptions noted (Tr. 15665-66).

3. Exception is taken to the statement that Commission's expert testimony is to the effect

> "that the price of a commodity sold at a delivered figure to a buyer who pays the freight and remits the balance to the seller, is the price realized at the point of production after the freight deduction".

upon the following grounds:

(a) the transcript references do not support the statement;

(b) the testimony of the witness Dr. Fetter cited in support of the finding is contradicted by and is inconsistent with other testimony of the same witness:

> "The word 'price' • • • has a variety of meanings and shades of meaning, according to the context, and has to be interpreted according to that context" (Tr. 17651-52);
>
> "The word would have a different meaning in the different contexts • • • " (Tr. 17656);
>
> "When referring to a competitive price in a market, the word 'price' would have one meaning,

and when referring to a delivered price under the basing-point system it would have quite a different meaning * * * " (Tr. 17656);

(As to selling as described in the long, hypothetical question of Counsel for the Commission):

"I should say there is no price in the ordinary economic sense" (Tr. 17656);

"We may have the expression 'destination price' or 'delivered price' and delivered price may also have a further modifier as 'identical delivered price'. There it applies distinctly to the basing point practice" (Tr. 17700).

By the witness's further discussion of the word "price" (Tr. 18165-67);

By his refusal to state that mill-net is price (Tr. 18183-85);

By his testimony as to the word "price" (Tr. 18321-25);

By his testimony that if the seller pays the cost of transportation, that might be an important distinction (Tr. 18350-51).

(c) The finding is contradicted by other testimony of the witness, Dr. Viner, who testified as follows:

"Q. Suppose an industry in which the commodity is sold only at delivered prices, and in which the buyer pays the freight to the railroad company, and deducts that from the face of the invoice, and pays the balance to the seller? What is the price in that case? A. I don't know,—I don't know how to answer that question. I don't —as I say, the term 'price' as used by the economist is ambiguous, unless further qualified.

"Q. And I did not sufficiently qualify it for you? A. Well, if you ask me what is the price, then I should say there is a mill net price there, and there is a delivered price, or that is a delivery equivalent of a mill net price * * *. There may be a wholesale price, and a retail price, a price on a cash basis, and a price on terms * * *. A seller can sell at his mill, or he can sell delivered, or he can sell either way * * * and he would quote different prices according to the terms and conditions of sale. They would all be prices, it seems to me" (Tr. 15676-78).

"For me as an economist a commodity offered for sale in San Francisco is a different commodity from one offered for sale in New York. * * *

"Q. Price, then * * * has a large number of elements? A. That is right" (Tr. 15713-14).

"Q. Is the mill net the price? A. If the commodity sold is cement *as of that mill*, then I would say the mill net is the price" (Tr. 15995-96). (Italics supplied.)

4. Exception is taken to the finding that Commission's expert testimony is to the effect

"that agricultural products are not sold on the basing point plan and that the methods employed in the sale of wheat are entirely different from those alleged and described [in advertisements] as applying to the sale of cement",

upon each of the following grounds,

(a) the statement is irrelevant and immaterial to the issues in this proceeding, since there are no allegations as to the manner in which agricultural products are sold, and it is not alleged or contended that cement should be sold by the same methods that are used in the sale of agricultural products; the Trial Examiner himself stated that this was a collateral issue only (Tr. 15307), and counsel for the Commission conceded (Tr. 15372-74), that he does not claim that cement ought to be sold on a central exchange, and that such issue is not raised by any allegation in the complaint;

(b) the testimony as to the methods used in the sale of agricultural products was duly objected to and admitted over such objection, with exception thereto duly noted (Tr. 15264-65; 15267; 15271-72; 15275-76; 15279-83; 15290; 15292; 15299; 15308-09; 15311-12; 15325; 15333; 15334-38).

5. Exception is taken to the statement that Commission's expert testimony is to the effect

"that identity of price, or 'matched competition', could not arise from individual activity and is the sort of thing that would result from monopolistic control",

upon each of the following grounds, viz.:

(a) the statement is not supported by the evidence or any references thereto;

(b) neither witness testified that identity of price was equivalent to "matched competition", and neither witness used the phrase "matched competition";

(c) that the statement is contradicted by other testimony of the witness Dr. Fetter:

"Q. Dr. Fetter, will you state whether or not in your opinion it is a fact that there is unanimity of opinion among economists that for all practical purposes and with a standardized commodity and conditions of effective competition there is the strongest kind of tendency to uniform prices? A. I think that is a correct statement of the theory as held regarding prices in a specific market of a competitive character * * * " (Tr. 17669);

(c) that the finding is contradicted by other testimony of the witness Dr. Viner:

" * * * Approximate identity of price to buyers at the some point is consistent with complete competition; also with complete monopoly." (Tr. 15752).

6. Exception is taken to the statement that the Commission's expert testimony is to the effect

"that absence of competition is indicated in the following circumstances (a) where base prices put in effect by one mill and recognized and followed by competitors are different on different sides of a state line; (b) where base prices of mills in adjoining areas differ by a constant figure from year to year, as a 10 cent differential assumed between Hudson Valley and Lehigh Valley Mills; (c) and where bids on large quantities running into a million barrels evidence a high degree of identity in delivered prices quoted for a large number of destinations",

on the grounds,

(a) the statement is not supported by the evidence;

(b) the witness' testimony with respect to clause "(b)" in the said statement was admitted over the objection of respondents to the question, which objection was overruled and an exception duly noted.

7. Exception is taken to the finding that the Commission's expert testimony is to the effect

> "that conditions which permit of cross-hauling, or 'dumping', are wasteful, uneconomic, and indicative of collusion and trade restraint",

on the grounds,

(a) the statement is not supported by the evidence;

(b) the finding is contradicted by other testimony of Dr. Viner to the effect that if cross-hauling were eliminated in the industry without governmental compulsion, it would indicate agreement and collusion (Tr. 15805); and to the effect that dumping is a form of competition in the market into which the goods are dumped (Tr. 15733-34); also that where producers are scattered geographically, so that each is protected in his own immediate vicinity by the cost of transportation from the nearest other producer, the differing mill nets of a producer are consistent with the absence of agreement (collusion) between the producers (Tr. 15814-15);

(c) a large part of the testimony of both Dr. Viner and Dr. Fetter to which reference is made was objected to and admitted over such objection, to which rulings exceptions were duly noted (Tr. 15638-39; 17763-70).

8. Exception is taken to the statement that Commission's expert testimony is to the effect

> "that the basing point system facilitates price leadership and permits of punitive action",

on the grounds that such statement is not supported by the evidence, and further exception is taken for failure to re-

port that the basing point method to the extent it is present, does not restrict the action of any respondent in the designation of his prices and that it has no relation to any punitive action.

9. Exception is taken to the statement that Commission's expert testimony is to the effect

> "that rigidity of prices over long periods of time, such as from Jan. 1, 1933, to June, 1938, indicates the absence of price competition",

on the grounds,

> (a) the statement is not supported by the evidence;
>
> (b) the transcript references—which are to the testimony of Dr. Viner and Dr. Fetter—do not support such finding.

10. Exception is taken to the statement that Commission's expert testimony is to the effect

> "that there are differences between the going price on grain markets, which is not predictable, and the one available price indicated in the cement advertisements in evidence",

on the grounds that the statement is irrelevant and immaterial to the issues in this proceeding, since there are no allegations as to the manner in which grain is sold and its price determined; and it is not alleged or contended that cement should or could be sold and its prices determined by the same methods that are used in the pricing and sale of grain.

11. Exception is taken to the failure to report the many subjects of testimony of Commission's economists which are substantially in accord with and in support of the testimony of respondents' economists. Such testimony of Commission's economists is included in the exceptions to Paragraph 227 and by reference is made a part of this exception.

Paragraph 227

1. Exception is taken to Paragraph 227 in its entirety because it fails to report a fair summary of respondents' economic testimony as hereinafter indicated; and also to the following erroneous statements in said Paragraph which are unsupported by the evidence:

(a) "Respondents' economists develop a concept of competition which involves a decided difference of definition";

(b) "That the cement manufacturers' ability to adjust supply to demand makes for price rigidity as against the different condition in the wheat market";

(c) "That inelastic demand encourages freight-absorbing sales in the effort to reduce unit costs in the presence of large overhead costs and in an effort to maintain production to meet seasonal demand and for this reason cross-hauling is economically justifiable".

2. Exception is taken to the failure to report the following testimony of respondents' economists, in almost every instance uncontroverted and in many instances corroborated by the Commissions economists:

(a) The economic concept of "perfect competition" requires a homogeneous product, a high degree of mobility of the factors of production, and so large a number of buyers and sellers that no one can influence the market price (Tr. 42949-50; 43510-11; 44428; 44593-94; 44628-30; 45492; 45807-08); it is a concept of an ideal never fully realized (Tr. 44144-45; 44912; 44411; 42951-54; 45827), but most closely approximated in the marketing of such agricultural products as grain and cotton (Tr. 43299-300; 45684; 45688; 48162-63).

(b) The term "imperfect competition" denotes competition that fails to meet the requirements of perfect competition" (Tr. 42950-51; 43308; 43465; 44144-47; 44303-04; 44411-14; 44430; 44630-32; 44926; 44951-54; 45491; 45754-60), as, for example, where the number of sellers is so small that each can influence price by his market offer-

ings (Tr. 42950-51; 43308; 43464-65; 44146-47; 44303-04; 44409; 44411; 44951-53; 43309; 44437); the term has no relation to monopoly nor does it shade into monopoly (Tr. 44921-22), does not imply collusion or agreement nor does it shade into collusion (Tr. 45826-27; 44936-37; 44633; 44921-22; 45333; 45493), has no relation to legality (Tr. 42953; 45494), and is a natural and not an artificial phenomenon (Tr. 43309-10; 43349), being the inevitable form of competition in all manufacturing industry (Tr. 42951-56; 43312; 44143; 44632; 44636; 44936-38; 44954-55; 45338; 45491-92; 45493; 45827; 46101); is entirely consistent with free competition (Tr. 44633; 44936-37; 45826-27); and does not imply less or weaker competition, since it is frequently more keen and vigorous than perfect competition would be (Tr. 42954-55; 44144; 44633-34; 44939; 45038-39; 45171-72; 45492-93; 45827; 46050-51).

(c) "Free competition" is competition not restricted by collusion or agreement, and restrained only by the individual self-interest of each competitor (Tr. 42984; 44637-38; 44098; 45445-46; 45528; 45665-66; 45806-07); it is a quality of competition that can exist even if the product is standardized and homogeneous (Tr. 44637-38; 45445-46; 44427-28); and is consistent with the exercise of individual self-restraint in marketing policies (Tr. 44218; 44636; 44638; 45828; 46118).

(d) In an industry such as this, with a homogeneous product and so few sellers as to create "imperfect competition", the economist expects each producer to consider the effect of his price and marketing policies and to scrutinize those of his competitors (Tr. 43002-04; 44215-17; 44409; 44412; 45534-35; 45827-28; 45957; 45968; 45970-71; 45988; 45990-91; 46012; 46027-29); and to exercise individual self-restraint (Tr. 43002-04; 44215-17; 44409; 44412; 45534-35; 45827-28; 45957; 45968; 45970-71; 45988; 45990-91; 46012; 46027-28) to avoid the dangers of cut-throat competition,—while still maintaining keen, vigorous competition (Tr. 43005; 43067-68; 43664-65; 44881-82; 45949-52; 45167-69), since cut-throat competition and price wars are injurious to each producer; and such cut-throat

competition and price wars are not beneficial to the public interest (Dr. Fetter,—Tr. 18443; Dr. Hibbard,—Tr. 20560).

(e) Competition may take various forms, such as (1) the use of price as a weapon, (2) the offering of a greater quantity for the same price, (3) the offering of better quality for the same price, and (4) the offering of service elements in addition to the goods themselves (Tr. 42957-59; 42964; 45237; 46126-28); it does not require the presence of or opportunity for "higgling" or bargaining over price (Tr. 45207; 45450; 44502-05; 46080-81; 46083-85; 46088-90) such as is characteristic of certain organized commodity markets, where it is in part due to the presence of speculative operators (Tr. 44503); it is facilitated by full information as to prices and market conditions (Tr. 44176-77).

(f) An act of price competition is distinguished from a condition of price competition, the former being the use of the weapon "price" and the latter being something that continues and persists between acts of price competition, and being characterized by general alertness and readiness to adjust one's price or offering to meet the price or offerings of competitors (Tr. 42966-67; 43393-94; 44740; 45242-45); a condition of price competition being similar to the continuing force of gravity when a body is not in motion (Tr. 45244).

(g) The presence of three conditions will produce a uniform market price, (1) a homogeneous product, (2) well-informed buyers, and (3) alternative sources of supply (*i. e.* more than one seller in the market) (Tr. 43023-24; 43537; 43965-66; 43528; 43766; 45172; 45505-08; 45047; 46090). This is usually stated as "a homogeneous product will have a uniform price in any one market at any one time" (which may be termed the Axiom of Uniform Price), and is universally accepted by all economists, including the early economists (Tr. 43023; 44177-78; 44658-61; 45082-84; 45172; 45415-19; 45505-06; 48138-40; 43692-93. To the same effect,—Dr. Duddy, Tr. 15378; Dr. Hibbard, Tr. 15588; 20557-59; Dr. Viner, Tr. 15674; 15688; 15762; 15812-13; Dr. Fetter, Tr. 17710). The Axiom is frequently stated as

a "tendency" toward uniformity, the word "tendency" to an economist meaning a force that will inevitably produce the indicated result in the absence of other conflicting forces (Tr. 43023; 43965-66; 44177; 45145-49; 44509; 44659).

(h) The Axiom of Uniform Price does not require conditions of "perfect competition" (Tr. 43976-81; 43300-01; 43965; 44167-68; 45057-62; 45083-84; 45690; 45506); is applicable to any industry irrespective of the method of marketing (Tr. 43026; 43525; 43528; 43584-85; 43617-18; 44173; 45046-49; 45398-99; 45506; 45854. To the same effect,—Dr. Viner, Tr. 15812-13; 15588; 15377-78; 15762) even though the technical conditions essential to a perfect market are not present (Tr. 45449); and applies to open quotations as well as to price in consummated sales (Tr. 44469-70; 45679-81; 45989). The Axiom rests on the so-called "Principle of Indifference", *i. e.*, that for homogeneous goods a buyer will not pay more for one unit than for another and is indifferent as to which unit he purchases (Tr. 44460; 44469-71; 45747-48).

(i) A homogeneous product is one that is so regarded by the purchaser, *i. e.*, one for which he will not pay more for supply from one seller than for supply from another (Tr. 43395-96; 43505; 45135-38; 45141-42. To the same effect,—Dr. Viner, Tr. 15787-88; 15834); and homogeneity does not imply that it is the result of collusion or agreement (Tr. 43506).

(j) The Axiom of Uniform Price is equally applicable to terms of payment and discounts, which are inseparable elements of price (Tr. 43092-93; 43760; 44184-87; 44706-09; 45580-81; 45876-79), and for reasons analogous to those underlying the Axiom, marketing policies of and service elements offered by different producers will tend to become uniform as a result of the individual decision of each producer (Tr. 43760; 45230; 44706-09; 45170; 45876-81; 43092-93; 43762-63; 44184-87; 45580-81; 46066-67), and such uniformity does not create an inference of collusion or agreement and is consistent with each producer following his individual self-interest (Tr. 44706-07; 45581).

(k) All forms of competitive rivalry—the use of a lower price, or the offering of greater quantity or better quality for the same price, or the addition of service elements—are forms of price competition (Tr. 42957-65; 43354-58; 44160-67; 43565-66; 44731-34; 45209-11; 45235-36; 45494-97; 45651-52; 45655), and it is impossible to separate competition through the use of price from other forms of competition (Tr. 42957; 43355-56; 44731; 45494; 45650-52), price being a value equation with respect to two commodities (or services), each defined as to quantity, quality, time, place and other terms of exchange (Tr. 44386; 45212-13).

(l) The fact that prices are identical does not indicate the absence of price competition (Tr. 42957-59; 44072) or justify an inference of collusion (Tr. 43231-38; 44110-13; 44569-72; 44646; 44795-96; 44798-809; 45406-07; 45597-98; 45910-11).

(m) Each of the following is an example of price competition—the meeting of a competitor's lower price (Tr. 43204-10; 43228-29; 44181-82; 44337-38; 44761-65; 45394; 45504-05; 45902; 45906-07); maintaining one's price at its present level in the face of attempts of competitors to raise prices (Tr. 44764); increased activity of salesmen or employment of additional salesmen (Tr. 44392-93); the attempt to sell in territory not previously canvassed (Tr. 44592-93; 44762; 45906-07); the changing of the classification of business sold only through dealers, to make this more attractive to such dealers (Tr. 44734-39; 45170); and the establishment of a separate base price at a silo distant from the mill, in order to make the area surrounding the silo less attractive to competitors (Dr. Viner—Tr. 15863).

(n) No one form of competitive rivalry—changes in price or quantity or quality or service elements—is more important than the others (Tr. 45659-60).

(o) Under the conditions of this industry, the economist expects that the openly quoted prices of different sellers will be identical at each destination (Tr. 45849-50. To the same effect, Dr. Viner—Tr. 15674; 15688; 15812-13; Dr. Fetter—Tr. 17957-58). The quoting of such identical price is a competitive act (Tr. 45304-05; 42966-67; 43209-

10; 44167; 44762-64; 45600-01; 45676; 45902; 45906-07; 45998-6000. To the same effect, Dr. Viner—Tr. 15752; 15822; Dr. Fetter—Tr. 17787; 18156; Dr. Hibbard—Tr. 20484) and exerts a pressure upon price (Tr. 43499).

(p) Under the conditions of this industry, the economist does not expect that each producer will successively offer lower prices than the prices of other producers (Tr. 44675-76; 45556-57; 45856-57; 45999), since this would carry prices ultimately below the cost of production (Tr. 45999. To the same effect, Dr. Hibbard, Tr. 20559-60; 20596-97), and would be equivalent to cut-throat competition and a price war (which are not beneficial to the national economy); and a rational business man cannot be expected to take such action (Tr. 45556-57. To the same effect, Dr. Viner—Tr. 15756-58; 15943-45; Dr. Fetter—Tr. 18443; Dr. Hibbard—Tr. 20559-60).

(q) Each producer knows that any reduction in his price is certain to be met by competitors and that identical prices will again result (as required by the Axiom of Uniform Price) (Tr. 44675-76), and this is one reason why a producer does not make successively lower prices (Tr. 44675-76; 44764-65).

(r) The granting of secret prices below the openly quoted prices is evidence of price competition (Tr. 43688-89; 44750; 45264. To the same effect, Dr. Viner—Tr. 15783-84; 16034-37), and the economist expects a certain amount of such secret prices in an industry such as this (Tr. 45440-41).

(s) Marketing at delivered prices is a widely-used form of marketing, not confined to industries selling through the use of basing-points (Tr. 43127-28; 44114-16; conceded by Mr. Wooden, Tr. 36730); it includes freight-equalization, zone and postage stamp methods and various others (conceded by Mr. Wooden, Tr. 36730); and the sale of agricultural products through a central exchange is the equivalent of delivered price selling (Dr. Duddy—Tr. 15269; 15411; Dr. Hibbard—Tr. 15482; 15563-64; 20452). Selling at delivered prices is largely the result of large-scale factory production (Dr. Fetter—Tr. 17980-85). When an industry sells

at delivered prices, these prices will present and follow a definite pattern (Tr. 44740-41).

(t) The Axiom of Uniform Price is applicable to delivered prices, and the prices at each destination will be identical if the product is homogeneous, buyers well-informed, and two or more sellers are offering to sell at that destination (Tr. 43023-26; 44331-32; 44462-63; 44766; 44655; 44661; 44667-68; 45085-88; 45357-58; 45505; 45851-52). Such identical prices do not justify an inference of collusion (Tr. 43345; 44172; 44528-29; 44657-58; 45852-54).

(u) When sales are at delivered prices, "price" is the consideration agreed upon by buyer and seller for the product delivered at destination (Tr. 43025-26; 43695-98; 43699-700; 44075; 44171; 44421-24; 44656-57; 45067-70; 45082; 45088; 45345-46; 45648; 45851. To the same effect, Dr. Viner—Tr. 15677-78; 15712-13; Dr. Fetter—Tr. 18250; Dr. Hibbard—Tr. 20491-93; 20505-06; 20509-11); it is not a freightless price, nor is it the "mill-net" derived by deducting cost of transportation from the consideration agreed to be paid for the commodity delivered at destination (Tr. 43218-21; 43227-28; 43974-75; 43987-88; 43978; 44178-80; 44330-31; 44674-75; 44780-82; 44791-92; 45111-21; 45344-45; 45348-51; 45371-73; 45487-90). Nor is this affected by the fact that at certain periods, some producers disclaimed responsibility for loss in transit; or by the fact that by agreement the buyer pays a part of the purchase price to the railroad for freight (Tr. 45066-70; 45345-46; 45062-65; 45080; 45215. To the same effect, Dr. Hibbard—Tr. 20494-95).

(v) When sales are at delivered prices, each destination constitutes a "market", as that term is used in the Axiom of Uniform Price (Tr. 43026-28; 44174; 44669-71; 45033-36; 45040-41; 45092-93; 45099-102; 45509; 45855-56; 46077), even though there is only one buyer at a particular destination (Tr. 43703-05; 45033-36; 45099-102).

(w) The selling by the use of multiple basing points is merely one form of delivered price selling (Tr. 43128; 44116; conceded by Mr. Wooden, Tr. 36730), and is used by a substantial group of industries in the United States (Dr. Fetter—Tr. 18125-28).

(x) The economist expects that when all or most of the following conditions are present in an industry, a multiple basing point method of selling will develop (Tr. 42985; 44741-44; 45809-12; 45921; 45938; 46011; 44119-20); a homogeneous commodity (Tr. 42985-88; 43483-85; 44117; 44742; 45538-39; 45809); relatively few producers scattered geographically and independently owned (Tr. 42985-86; 43483-85; 44117-18; 44742; 45809-10; 42990-91); a large number of buyers so located as to present a pattern of demand different from the pattern of location of producers (Tr. 43483-84; 44118; 44742; 45809-12; 43512-13); a demand for the product varying locally and seasonally (Tr. 44120; 45538-39); the capacity of most producers in excess of the local demand (Tr. 44119; 44742; 45538-39; 45809-10; 42991-92); the necessity for a large plant investment with resulting high overhead costs (Tr. 42985-87; 44118; 44742; 45538-39; 45809-10); a relatively inelastic total demand for the commodity (Tr. 42985-86; 43483-85; 44119; 45809-10; 42991-92); a bulky, heavy commodity, so that cost of transportation to point of purchase or use is a substantial part of delivered cost (Tr. 42985-86; 43483-85; 44119; 44743-44; 45538-39; 45809-10; 42988-89). A state of competition must exist in the industry to cause such development (Tr. 44116-17; 44742; 42991; 43290), and the development is facilitated by the exercise of individual self-restraint on the part of each producer in his pricing and marketing policies (Tr. 43290).

(y) The marketing method and practices described in the so-called "long hypothetical question" (Tr. 42967, *et seq.*) could logically be the result of a natural economic development (Tr. 42974; 43247; 44098; 44618; 45515-16; 45806; 43921); constitute a natural and reasonable method of marketing (Tr. 43582-83; 44133-34; 44944-45; 45539-41; 46072-74; 44480-81; 42994; 43921; 45921); do not preclude the existence of free competition (Tr. 43288; 43932; 42974-75; 43244; 43258-59; 44098; 44107; 44150; 44618-19; 45516; 45806; 46073); do not indicate to the economist that they were arrived at by collusion or agreement (Tr. 44481-82; 44944-45; 45597; 42975; 43288; 43290; 43494-95; 43922; 43929-33; 44099; 44476; 44589-90; 44619; 44812; 44822-23;

45516; 45663-65; 45736-38; 45808; 45830; 46071. To the same effect, Dr. Viner—Tr. 15702-03; 15814-15); their continuance by the individual action of each producer is adequately explained by the fact that each producer has found and believes that they are in his individual self-interest (Tr. 44480-82; 44113; 45538; 45828-30; 44626-27; 44643; 45528-30; 45597; 42996; 45836).

(z) The marketing method and practices described in the "long hypothetical question" (Tr. 42967, *et seq.*) facilitate the meeting of local fluctuations of demand (Tr. 42984-85; 43496-97; 44107-08; 45534; 45831); do not tend to increase the price of the commodity (Tr. 43001-02; 44126-31; 45195); do not lessen or restrain competition or price competition (Tr. 43620; 43623-24; 44134; 46016; 46080; 42998-43000; 44126); do not protect a poorly located plant (Tr. 44649; 43214-15; 43517-24; 43591-95; 45017-21); do not tend to create over-capacity in the industry (Tr. 43857; 44113-14); have no resemblance or relation to the so-called "Pittsburgh Plus" method at one time used in the steel industry (Tr. 44488-93); and contain many features that lead the economist to conclude that the method and practices could not have resulted from collusion or agreement (Tr. 43247; 43494; 43931; 44589-90; 44831-33; 44841-43; 44846-49; 44851-56; 44868; 44871-72; 44875-76; 44879-80; 44883-85; 45663-65; 45808; 45939-46; 45978-79; 46002; 46057-64). Any marketing method adopted by independent action tends to perpetuate itself by inertia and custom (Tr. 45543).

(aa) The economic development of the marketing method described in the hypothetical question appearing at Tr. 42975-79 is one which the economist would normally expect to find in such an industry (Tr. 42980; 44104-05; 44624; 45522; 45818-19); it does not preclude the existence of free competition (Tr. 42980; 44104; 44623; 45521; 45816); it is one that does not indicate that it was arrived at by collusion or agreement (Tr. 42982; 44106-07; 44625-26; 45526-27; 45821-22); it indicates to the economist that it could not have resulted from collusion or agreement (Tr. 43494); and the foregoing conclusions would not be

altered by adding the further assumption that delivered price is usually the equivalent of the lowest combination of some price base plus rail freight to destination (Tr. 42984; 44107; 44626; 45528; 45824-25).

(bb) When a multiple basing point method exists in an industry, a new entrepreneur finds it economically advantageous to adopt it (Tr. 42995-96; 45531-33; 45835-36; 44641); it would be economically disadvantageous for any one producer to abandon it (Tr. 42994-95; 43153-55; 43838; 44995-96; 45530-31; 45533; 45550-52; 45831-35; 44300; 44305-07; 44638-41. To the same effect, Dr. Fetter—Tr. 18014-18); the normal forces of competition will not lead to its elimination (Tr. 43949; 44137-38; 44996; 46041); and its abandonment would indicate collusion in the absence of governmental compulsion (Tr. 43346; 44137-38; 44314-16; 44642-43; 45300; 45836-38; 46041; 43155-56; 45890-91; 46035-36. To the same effect, Dr. Viner—Tr. 15805; Dr. Fetter—Tr. 18013-16; 18119; 18122).

(cc) Elasticity of demand is that quality of demand by which demand increases as price decreases and vice versa (Tr. 43056; 43574-75; 44449-50; 44458-60; 44693-94. To the same effect, Dr. Fetter—Tr. 18144); when demand responds in a high degree to changes in price, it is called an elastic demand and when it does not, an inelastic demand (Tr. 43056-57; 43560-61; 44449-53; 44694; 45584). It has no reference to size of demand (Tr. 44078; 44458-60). Inelasticity of demand is an important cause of so-called freight-absorbing sales and of the use of the multiple basing point method (Tr. 48168-69).

(dd) Cement is a product that has an inelastic demand (Tr. 43064; 44698; 45874); whenever the cost of a product is only a minor component part of the cost of producing another product, the former product has an inelastic demand to the extent it is so used (Tr. 43060-61; 43058; 43561-62; 44454-55; 44695-96); and since cement is ordinarily used in the construction of roads, buildings, etc., where in each instance its cost is only a minor component part of total cost, this is a principal cause of its inelastic demand (Tr. 43058; 43063-64; 44698).

(ee) The so-called non-base mill which seeks business by meeting the lowest openly-quoted price which it finds competitors quoting at each destination is engaged in price competition (Tr. 44154; 44650; 45031-32; 42957-65; 43354-58; 44160-67; 43365-66; 44731-34; 45209-11; 45235-36; 45494-97; 45651-52; 45655); and when it decides to become a base mill and begins quoting as such, this evidences competition and does not indicate collusion (Dr. Fetter—Tr. 17987-88).

(ff) Direct costs (or variable costs) are the costs of labor, material, power, etc. which vary in amount in proportion to the number of units produced (Tr. 43065-66; 44752-53); overhead costs (or fixed costs),—such as interest on borrowed money, cost of repairs of buildings, depreciation of plant and equipment (except as based on rate of operation), insurance, taxes (other than income taxes), and managerial expense,—are those costs which do not vary directly with the number of units produced (Tr. 43006-07; 43065; 44020; 44230-31; 44752-54; 45901). In general, the greater the investment in plant and equipment, the higher the overhead costs (Tr. 43067; 44231-32; 44754; 45901).

(gg) When overhead costs form a large proportion of total costs (total costs being direct costs plus overhead costs), a plant has a high overhead cost (Tr. 44232; 45561-62); since overhead costs are customarily distributed among total units produced, the greater the number produced, the lower the total cost per unit (Tr. 44232-33; 45560-61; 45901-02); the presence of high overhead costs places pressure on the manufacturer to produce and sell as many units as possible, since each additional unit sold at an amount in excess of direct costs contributes something to total overhead costs and reduces average unit costs of all units produced (Tr. 44232-33; 45563-64; 45560-61; 45901-02; 43070); the incentive to reduce average unit costs, coupled with inelastic total demand, causes freight-absorbing sales (Tr. 43068-69; 43064-65; 43701-02); the economist regards such sales at differing mill-nets as justified when each sale contributes something toward total overhead

costs (Tr. 43068-71; 45560-61; 45563; 44754-57; 43645; 43701-02; 44233-36).

(hh) Cement is an industry having high overhead costs (Dr. Fetter—Tr. 18021). Overhead costs have no relation to capitalization, and high overhead costs do not indicate over-capitalization (Tr. 43731; 44077). The presence of high overhead costs leads each producer to exercise individually a natural restraint in pricing policy to avoid ruinous competition (Tr. 43067; 43338).

(ii) All industries selling at delivered prices employ some method of freight equalization (Dr. Viner—Tr. 15796-97); so-called freight-absorbing sales and other methods of freight-equalization are found in industries that do and others that do not employ a basing point method (Tr. 43089. To the same effect, Dr. Fetter—Tr. 18124-25; 18128-31; Dr. Hibbard—Tr. 20486-87; 20489-91; see concession by Mr. Wooden, Tr. 36730); freight-absorbing sales are a characteristic and essential element of a multiple basing point method (Tr. 43676; 44297).

(jj) Freight-absorbing sales indicate the existence of competition and price competition (Tr. 45906-07; 46136; 43642; 43089; 45728-29; 43014. To the same effect, Dr. Viner—Tr. 15721-22; 15734; 15821; and Dr. Fetter—Tr. 18053) and such sales are competitive acts (Tr. 43014; 45304-05; 42966-67; 43209-10; 44167; 44762-64; 45600-01; 45902; 45906-07; 45998-6000. To the same effect, Dr. Hibbard—Tr. 20491); they exert a downward pressure on price (Tr. 43499; 44756-58); they reduce average costs of all units sold (Tr. 43014; 43068-71; 45560-61; 45563; 44754-57; 43645; 43701-02; 44233-36); they create no implication of a voluntary sharing of markets (Tr. 44463-66; 46134-35; 44112-13; 44798; 44808-10) since no producer can prevent such sales by competitors in his own market area (Tr. 44463-66; 46134-35; 44112-13); they are not evidence of collusion or monopoly (Tr. 43645; 44526-27; 45597-98; 43639-42; 45663-65; 45728-99; 46066; 44110-13; 44808-10; 45597-98; 45910-11; 44480. To the same effect, Dr. Viner, Tr. 15702-03; 15814-15) or agreement in restraint of trade (Tr. 44526-27; 44840; 45597-98; 45728-29); they do not

constitute discrimination (Tr. 43005-07; 43012-14; 43018; 43089-90; 43746; 43679-80; 44544-45); they reduce average costs of all units sold and thus enable the producer in his other sales to sell at a lower price than would otherwise be possible (Tr. 43014; 43068-71; 45560-61; 45563; 44754-55; 43645; 43701-02; 44233-36; 44756-57); they increase the number of sellers in each market and furnish the buyer with alternative sources of supply (Tr. 43014; 44757-58) and this benefits the buyer, even through the prices of all sellers are identical (Tr. 44120-21); they do not lessen competition (Tr. 43019); their objection is to secure larger profits (Tr. 45597-98. To the same effect, Dr. Viner—Tr. 15723); they are one form of what the economist calls the "separation of markets" (Tr. 43064-65).

(kk) Among the principal causes of freight absorbing sales are (1) inelasticity of total demand (Tr. 43064-65; 43538; 48168-69); (2) the presence of unused (or "excess") capacity (Tr. 44233-35); (3) fluctuations in demand in a producer's nearby markets (Tr. 46134-35); and (4) the necessity of meeting the existing and different competitive forces in each market where such sales are made (Tr. 44496; 45597-98; 45326; 43018). In an industry such as this the economist expects freight-absorbing sales under free competition (Tr. 43643; 45250-51; 45598; 43810-11).

(ll) Freight absorption would not exist under conditions of "perfect competition", but under conditions of "imperfect competition" (inevitable in such an industry as this). It is a common characteristic of such competition (Tr. 43089); there would be no such sales under a uniform f.o.b. mill method (Tr. 43676; 44297); the normal forces of competition in this industry will not eliminate such sales (Tr. 43949; 44137-38; 44996; 46041). There is no so-called "advantage of location" that belongs to a buyer close to the producing point that entitles him to a lower price than the price to a more distant buyer (Tr. 42996; 43613-14).

(mm) The marketing method described in the hypothetical question at Tr. 42975-79 is beneficial to producer, buyer and consumer (Tr. 44120-21; 45542; 46041-43); it enables the buyer to know in advance the exact cost of

cement delivered at destination (Tr. 44120-21); it tends to reduce prices to a reasonable margin above production costs (Tr. 43001-02); it affords free expression to the so-called "Law of Supply and Demand" (Tr. 44001-02; 44108-10; 44796-97; 45032-33; 45579; 45597); and the rise in certain base prices in the Summer of 1932 was not inconsistent with such law (Tr. 43216-17; 43224-26; 43231-32; 43327; 43990; 44333-36; 45341-42; 45604-05. To the same effect, Dr. Hibbard—Tr. 15574; Dr. Viner—Tr. 15986; 15988).

(nn) Certain competitive wastes are inevitable in all forms of competitive rivalry under free competition (Tr. 43000; 43075; 43895-96; 44225; 44647-48; 44744; 45564-66; 45716-19); these wastes include duplication of sales efforts, excessive advertising, duplication of retail services including delivery, excessive duplication of plants, cross-hauling, and many others (Tr. 43075-77; 44226-28; 44647-48; 45566); the presence of such wastes (including cross-hauling) is an indication of competition (Tr. 45569-70. To the same effect, Dr. Viner—Tr. 15790; Dr. Hibbard—Tr. 20481); to eliminate such wastes (including cross-hauling) would lessen competition (Tr. 44748-48); the economist does not consider the waste of cross-hauling to be of greater importance than other competitive wastes (Tr. 43077; 43082-83; 44226; 44747-48; 45253; 45566. To the same effect, Dr. Viner—Tr. 15795-96); the advantages of free competition outweigh the economic loss involved in competitive wastes such as cross-hauling (Tr. 44647-48).

(oo) Cross-hauling is the transportation of homogeneous products of two sellers in opposite directions at the same time, so that they pass each other (Tr. 43086; 44746). It is not cross-hauling if (1) the shipments are made at different times (Tr. 43083-84; 44746; 45249-50. To the same effect, Dr. Viner—Tr. 15786); (2) if the two brands of cement vary in color (Tr. 43085-86; 44746-47. To the same effect, Dr. Viner—Tr. 15787-88); (3) the customer has a preference for one seller's product (Tr. 43085-86; 44746-47. To the same effect, Dr. Viner—Tr. 15787-88); or merely because the cement is not purchased from the nearest mill (Tr. 43076; 43086); nor are all cases of freight-absorbing sales instances of cross-hauling, and the amount of freight-

absorption is not a measure of cross-hauling (Tr. 43083; 43085; 44748; 45566. To the same effect, Dr. Viner—Tr. 15785). The accurate measure of cross-hauling is a difficult if not impossible problem (Tr. 43088; 44748; 45255).

(pp) Cross-hauling does not indicate collusion or agreement (Tr. 45570); it is not peculiar to industries selling on a basing point method (Tr. 44228-29; 45723-26. To the same effect, Dr. Viner—Tr. 15796-97; Dr. Hibbard—20476-78); it does not tend to increase the price to the consumer (Tr. 43000-01); the self-interest of each producer places a restraint on the extent of the cross-hauling in which he will engage (Tr. 43083). Cross-hauling can only be eliminated by collusion or governmental action (Tr. 45569. To the same effect, Dr. Viner—Tr. 15805); its elimination would not necessarily reduce the price to the consumer (Tr. 43001); there would be no cross-hauling in an industry in which there was a monopoly (Dr. Viner—Tr. 15790).

(qq) A rigid price is one that over a period of time shows relatively small variations in amount and relatively infrequent changes (Tr. 43028); in determining rigidity, actual (including secret) prices should be used, rather than quoted or published prices (Dr. Viner—Tr. 15747-49); more rigidity is expected in the prices of manufactured goods than in those of securities or agricultural crops sold on central exchanges (Tr. 45594. To the same effect, Dr. Viner—Tr. 15746).

(rr) Among the principal causes of price rigidity in any industry are (1) inelasticity of total demand (Tr. 45584-87; 45866; 43058-60; 44189; 44199; 44700-01; 45875-76. To the same effect, Dr. Fetter—Tr. 18145); (2) the fact that the product enters production of other commodities but only as a minor part of their total cost (Tr. 44192-97; 45585-58); (3) the ability to regulate production to demand (Tr. 43029-30; 43049-52; 45584; 45594; 45867); (4) custom (Tr. 43029); (5) fear of retaliation from competitors if price is reduced, and resulting self-restraint (Tr. 43029; 43045-46; 43714; 45866); (6) certainty that reductions will be met by competitors, resulting in no competitive advantage from reducing (Tr. 43029; 43045-46; 43058-

60; 43714; 44187-88; 44191-92; 44700-01; 45593-94); (7) absence of change in competitive situation (Tr. 44187-48); (8) relatively few producers (Tr. 44187-88; 44691-92; 44192; 44206; 44189; 45866; 45871; 45875-76); (9) the reaching of a condition of equilibrium between marginal costs and marginal revenue (Tr. 44188-89); (10) the fact that the product is homogeneous (Tr. 44691-92); (11) the presence of well-informed buyers and sellers (Tr. 44691; 43045-46; 43737; 44192; 44206; 45593-94; 45871); (12) the competition of substitute materials preventing a price increase (Tr. 45871-72); (13) the fact that an increase of price may induce others to enter the industry and increase the competition (Tr. 45871-72); (14) the fact that in a basing point industry an increase in base price makes the territory affected more attractive to competitors and increases the competition therein (Tr. 45871-72); (15) the fact that producers have learned that a price reduction may be followed by still greater reductions by competitors and result in a price war (Tr. 43036; 43714; 45167-68; 45592; 45873); (16) the existence of a condition of "imperfect competition" (Tr. 45334); (17) the presence of high overhead costs (Tr. 43041-42); (18) the fact that no price advance can be maintained unless all competitors follow the advance, which causes a producer to hesitate to lower price since he cannot freely restore it to its former level (Tr. 44692-93).

(ss) In this industry, the following are factors tending to create price rigidity: (1) the fact that most companies have at all times large obligations on specific job contracts containing clauses requiring the manufacturer to reduce price under the contract if he reduces his commercial price at the delivery point (Tr. 43030-31; 44203; 44702; 45588-89; 45567-69. To the same effect, Dr. Fetter—Tr. 18409-10); (2) the fact that such contracts stipulate the maximum price, so that, on deliveries thereunder, the manufacturer cannot get any advantage if he increases the commercial price (Tr. 43031; 44204; 44702-74; 45164-65; 45590; 45869); (3) the custom to protect dealers on cement recently purchased if price declines, by giving credits on all such recent shipments (Tr. 43034; 44204-45; 44705-06; 45590; 45870);

(4) the custom of giving several days' notice on price advances and permitting dealers to purchase any quantity within that period at the prevailing lower price for which they will take delivery within fifteen days thereafter (Tr. 43032; 44705; 44204; 45590; 45869-70); (5) the fact that each producer has learned by experience that a reduction in his delivered prices is certain to be met by competitors (Tr. 43035; 43052-53; 43064; 44706; 44191; 44692-93); and (6) the fact that certain so-called "chain mill" companies have frequently found it necessary to change their price base at each of their mills if they change the price base at any one mill (Tr. 43044; 44205-06; 45593; 45871). The cement industry is not an industry in which the economist would expect frequent price changes (Tr. 44199; 45874).

(tt) Price rigidity is not the result of the use of basing points or peculiar to basing point industries (Tr. 43724; 43952-53; 44199-201; 44329; 44595-97; 44601-03. To the same effect, Dr. Fetter—Tr. 18154); it does not justify an inference of collusion (Tr. 43036-38; 43044; 43726; 44192; 44210-12; 44515-16; 44521; 45574; 45338-39; 45362-63; 45588; 45592-93; 45601-03; 45873-74. To the same effect, Dr. Fetter—Tr. 18154); it is more consistent with the absence of collusion and the presence of free competition (Tr. 43034-35; 44516; 45592-93; 45873-74); it does not indicate the absence of price competition (Tr. 43034-35; 43048; 43477; 43542-44; 45588; 45601-03); the use of a uniform f.o.b. mill method would be as likely to cause rigidity (Tr. 44199-200; 45583-84; 45874). The best single test of rigidity is whether prices change with the same frequency as prices of other standardized commodities (Dr. Viner—Tr. 15809-12).

(uu) The economist considers the adoption by one manufacturer of a policy of preventing diversions in transit is consistent with individual action in the individual company's self-interest (Tr. 43104-08; 44218-20; 44685-88; 45861-64; 45576-79); if other manufacturers thereafter adopt similar policies, this does not justify an inference of collusion (Tr. 43108; 44220-21; 45579; 45864-65); since if one adopted such a policy and the others did not, the latter would lose their regular dealer business (Tr. 43109;

44221; 44689-90; 45579-80; 45865). The fact that for more than twenty years cement manufacturers have generally attempted to prevent such diversions is consistent with the existence of competition and does not indicate collusion (Tr. 43109-10; 44221-22).

(vv) Under the conditions of the industry with respect to sales to trucks at the mill, a change in practice with respect thereto is consistent with individual action in the individual company's self-interest (Tr. 43100-03; 44222-24; 44650-53; 45570-75; 45843-47); and the adoption of the same practice by others would not raise an inference of collusion (Tr. 43102-03; 44224-25; 44653-54; 45575-76; 45847-49; 46131-32).

(ww) Market leadership is an exceedingly common phenomenon under conditions of "imperfect competition" (Tr. 43091. To the same effect, Dr. Viner—Tr. 15776); the term relates to taking the initiative in price changes and also changes in marketing policies and practices (Tr. 43090-91). Competitors are compelled in their own self-interest to follow any changes in marketing policies instituted by a leader, which appear to customers to be more advantageous to them, either by adopting identical policies or making other changes which they hope will be equally attractive to customers (Tr. 43760; 45230; 45879; 46066). Market leadership is consistent with free competition and does not justify an inference of collusion (Tr. 43091; 45563; 45782-83. To the same effect, Dr. Viner—Tr. 15776-77). This industry is one in which market leadership is to be expected (Tr. 45563-64); and each "base mill" is a market leader as to price in the area where its price base plus freight is less than any other price base plus freight (Tr. 43756; 45043-44).

(xx) Irrespective of the method of marketing or quoting prices, the economist expects that in bidding to a governmental authority, each seller will attempt to estimate the prices which he believes will be bid by competitors (Tr. 44241; 44276-77; 44681; 45123-24; 45555; 46020-22; 46033. To the same effect, Dr. Fetter—Tr. 18495), will individually exercise such self-restraint as will avoid the

danger of a price war (Tr. 44246-47; 44506-07; 45556; 46022; 46030-31; 46024-26), and that if bidders are well-informed and the product homogeneous, there will be a tendency toward identical bids (Tr. 45555; 45859-60). There is no greater degree of identity in bids identical to the sixth decimal point than in bids identical in dollars and cents (Tr. 43768-69; 45173-74).

(yy) Under the assumed conditions (see hypothetical question, Tr. 43111) the economist expects a manufacturer to bid the commercial price at the destination and that the bids would be identical (Tr. 43113-15; 43774-76; 44236-40; 44506-07; 44676-77; 44683; 45121-24; 45552-55; 45857-59), and such identical bids are compatible with individual competitive action (Tr. 43114-15; 43345-46; 43783-84; 44240-41; 44246; 44683-84; 45859; 46022) and do not raise an inference of collusion (Tr. 43114-15; 43345-46; 43783-84; 44240-41; 44246; 44683-84; 45859; 46022); if he bids f.o.b. mill, each bidder is expected to determine his bid by deducting his freight rate to destination from the commercial price at destination (Tr. 43114; 44683-84); if there is a land grant or special rate from the mill of one or more prospective bidders to destination, each bidder would be expected to fix his f.o.b. mill bid at a figure giving a destination cost as low as the lowest destination cost available from competitors (Tr. 44684; 45121-23; 45555; 45859), and this would result in such destination costs (*i. e.*, f.o.b. mill price plus freight) being identical, but this would not raise an inference of collusion (Tr. 44241-43; 44685; 44246; 45121-32; 45555; 45860; 46032-33); the mere existence of a land grant or special rate would not affect the expectation of the economist that the destination costs would be identical (Tr. 43783-84; 44243-46); a refusal or failure to bid f.o.b. mill does not raise an inference of collusion (Tr. 43120-23; 44247-48; 44654-55; 45051-54; 45556; 46022); and with the added assumptions that the dealer-business is the backbone of the business of each producer and that dealers learn of prices bid to governmental authorities and demand an equally low price, the economist would not expect a producer to bid a specially low price below the regular commercial price at destination, even if a large quantity

were involved (Tr. 43118-20; 44243; 44246-47; 44676-77; 44683; 45556).

(zz) The economist believes that the continuance of the method of selling at delivered prices in this industry as described in the hypothetical question at Tr. 42975-79 is in the public interest (Tr. 43239-41; 44135-37; 44304; 44647-48; 44811-12; 44481-82; 45601; 45411-12); and that as between the uniform f.o.b. mill method and the present method, the latter is more in the public interest (Tr. 42185-97; 43192-97; 43918-20; 44811-12).

(aaa) To determine whether competition has been lessened by the industry's marketing practices, there are only two tests: (1) an historical comparison of present competitive conditions with competitive conditions at some period when another marketing method was in use (Tr. 43124; 44711-13; 45886-87); and (2) a comparison of present competitive conditions with those which would exist under some alternative method of marketing (Tr. 43124-25; 44711-13; 45886-89). The former test is impossible where the present method has been in use for a long period of years, due to the absence of necessary data (Tr. 43124; 43802-04; 44711-13; 45174-75; 45886-87). The only reasonable alternative method of marketing for a comparison is the uniform f.o.b. mill method (Tr. 43124; 43181-82; 45178). The test cannot be made by a comparison with the hypothetical conditions of "pure competition" or "perfect competition", since these are abstractions that could not exist in this industry (Tr. 45887-88).

(bbb) It would not be feasible in this industry to use the "postage stamp" method of selling at a uniform delivered price throughout the United States (Tr. 43131; 43133; 43176; 44709-11; 45882-83); nor the "zone pricing" method of dividing the country into a few large zones with one delivered price uniform throughout each zone (Tr. 43131-32; 43175-76; 44709-11; 45882-83); nor a limitation on freight absorption which could only be imposed by a statutory enactment (Tr. 43131-32; 43173-74); nor central exchanges in the manner in which securities, grain and cotton are sold (Tr. 43133; 44709-11; 45882-86), be-

cause the necessary conditions that make such exchanges advantageous are not present (Tr. 43177-80). The effect would be to make such exchanges basing points (Tr. 43180-81), and to increase the cost to the consumer (Tr. 43181). Under either the "zone" or "postage stamp" method, there would be more freight absorption than at present (Tr. 43176-77). Neither would increase competition (Tr. 43175), and a limitation upon freight absorption would decrease competition (Tr. 43173-74).

(ccc) To add to the present method of marketing a buyer's option to purchase f.o.b. mill would not increase competition (Tr. 44324; 44560); the granting of such an option would disrupt relations with customers (Tr. 44323-24; 44969; 44971-74); the option would only be advantageous to certain customers located so near the mill that trucking costs to destination were less than freight rates (Tr. 43170-71); the buyer would be expected to weigh the option and only exercise it if it resulted in a lowered delivered cost (Tr. 43169-70; 44317-20; 44423; 44727-30; 45617-18); if the great majority of a mill's customers were opposed to the granting of the option, the economist would expect it to be withdrawn (Tr. 43172-73; 44563-64; 44730; 45201-02); the ultimate result would be the withdrawal of the option and a return to the present marketing method (Tr. 44320; 44322; 45618-19; 46036-38), since the economist does not believe that such option and the present method of delivered prices could continue to exist side by side (Tr. 43878).

(ddd) The effects of a uniform f.o.b. mill method would be (1) to eliminate freight absorbing sales (Tr. 43140); (2) to reduce the marketing area of each mill (Tr. 44268-69; 46505; 46507; 45892-93. To the same effect, Dr. Fetter, Tr. 17752-53; 17945); (3) to reduce competition (Tr. 43142; 43820; 44269; 44724-25); (4) to create areas of local monopoly around each mill wherein it would be the only seller (Tr. 43146; 43820-21; 43143-44; 44273-74; 44297; 44559-60; 44724-25. To the same effect, Dr. Fetter—Tr. 17945; 17976-77; 17997); (5) to decrease the number of sellers in every market (Tr. 43142); (6) to create ruinous competition be-

tween any two mills closely adjacent (Tr. 43146; 43823-26); (7) to increase the average price of cement (Tr. 43146; 43649-51; 43820-21; 44270-74; 44725-26; 45189-92; 45606-07; 45893-96); (8) to reduce efficient service, prompt deliveries, engineering advice and other forms of service competition (Tr. 43144-45; 43601; 43649-50; 43904; 43909-11); (9) to eliminate secret price cutting (Tr. 43160-61; 46050); (10) to increase total mill capacity and average costs of production (Tr. 43161-63; 43831-32; 44308-09; 45612-13. To the same effect, Dr. Fetter—Tr. 18020); (11) to place the "chain mill" companies in a more advantageous position than many single mill companies (Tr. 43163-64; 43860-61); (12) to increase the cost of large government projects requiring more cement than the nearest mill could supply (Tr. 43157-60; 44312-13; 44726-27; 45608-11; 45900. To the same effect, Dr. Viner—Tr. 15957-58; Dr. Fetter—18085); (13) to have identical prices whenever two or more mills were located at the same shipping point (Tr. 44298-300; 45188); (14) to result in identical delivered costs whenever two or more mills were selling for use at the same destination (Tr. 43164-65; 43508-09; 43868-69. To the same effect, Dr. Fetter—Tr. 18062; 18067-68); (15) to create a pattern of delivered costs similar to the present pattern of delivered prices (Tr. 43164; 43865-67; 44309-11; 45245-47); (16) to create no greater degree of competitive pressure than now exists (Tr. 43240; 43819-20); (17) to have two mills in competition only in marginal zones where their mill prices plus their respective freight rates produced identical delivered costs, such competition being of no economic significance unless there was a substantial demand for cement in such zones (Tr. 43822; 44270; 44298; 45187. To the same effect, Dr. Fetter—Tr. 18083); (18) to cause the merger and consolidation of many companies now independent and competing (Tr. 46050); (19) to permit a mill located close to an important market to raise its price higher than its present maximum mill net (Tr. 43820-22; 43828-31; 44273-74); (20) to produce a market structure equivalent to that which would result from a collusive division of market territory (Tr. 43846-47; 44307); (21) to result in bids to governmental authorities that would show identical delivered costs (Tr. 43164-65; 43868-76); (22) to

surrender the entire Atlantic seaboard to foreign cement producers (Dr. Fetter—Tr. 18131-34; 18140-43); and (23) to permit its evasion by establishment of separate grinding plants, silos, etc., which would tend to increase price to the consumer (Tr. 43151-53; 44316-17).

(eee) If each mill is to sell only at an f.o.b. mill price, a uniform mill price is preferable to a non-uniform f.o.b. mill price (Dr. Viner—Tr. 15949-50; 15953-54). The adoption of an f.o.b. mill price method with the right to make occasional and sporadic sales at lower mill prices for delivery to distant points would prevent maintaining a dealer organization and dealer sales in such distant markets (Tr. 43135-36; 45614-15); such a method would not increase competition (Tr. 43137-38; 45616); would not eliminate cross-hauling but merely reduce it (Tr. 43138; 46052); would create great dissatisfaction among customers and destroy customers' good-will (Tr. 44725; 44960-62; 44974-75; 44979-80; 44987-93); would not be more in the public interest (Tr. 45616); and the delivered costs would resemble the pattern of delivered prices under the present method (Tr. 45889-90). The making of freight-absorbing sales constantly and regularly is no more indicative of collusion than the making of them occasionally and sporadically by differing f.o.b. mill prices (Tr. 43136; 45615-16).

(fff) Competition in this industry could be increased by increasing the accuracy and promptness of information available to buyers and sellers; also by increasing the number of producers, but this would not necessarily reduce costs or prices (Tr. 44325).

(ggg) The method of marketing described in Mr. Wooden's hypothetical question (see Tr. 17639, *et seq.*) is a competitive method of selling (Tr. 43206; 44181-82; 44337-38; 44645-46; 44761-65; 45002-05; 45484-85; 45497-505; 45839-42); corresponds to the so-called multiple basing point method (Tr. 43206); does not tend to preserve a high-cost antiquated mill (Tr. 43206); does not lessen demand for cement (Tr. 43206-08); does not justify an inference of collusion and is consistent with the existence of competition (Tr. 44646; 45484-85); is properly described

as a method of meeting competition (Tr. 43209-10; 43228-29; 44181-82; 44337-38; 44761-65; 45394; 45497-505; 45902); has no greater tendency toward price rigidity than would a uniform f.o.b. mill method (Tr. 45583-84); is one that could result from the normal operation of economic forces (Tr. 43581); and is one that can be properly described as a fully competitive method (Tr. 43213); if it includes occasional departures from the so-called formula method of pricing, it corresponds closely to pricing methods in other industries regarded as highly competitive (Tr. 44327-28). There is no single marketing method that can be called a "typical competitive method" (Tr. 43217; 44329; 44645; 44780).

(hhh) It is an indication of the presence of competition if goods are produced at as low a cost as practicable (Tr. 42965-66; 44448; 44749); if goods are sold at a price not above cost of production plus a reasonable or normal profit (Tr. 42965-66; 43329-30; 43387-88; 44749; 45255-59); if the industry shows signs of competitive rivalry such as sales activity, advertising, and technological improvements in process and product (Tr. 42965-66; 43020-21; 44156-58; 44749); if customers frequently shift from one seller to another (Tr. 44749); if, at a time when costs are increased substantially, prices do not rise correspondingly (Tr. 44749-50; 45623); if secret prices are occasionally granted below the openly quoted prices (Tr. 43688-89; 44750; 45264); if the individual producer is constantly endeavoring to improve his relative position by reducing his costs of production (Tr. 44140-41).

(iii) Under free competition, there is no tendency to eliminate competitors until only one seller remains (Tr. 44563); there is a strong tendency for marginal revenue to equal marginal costs, and for marginal costs to equal total average costs (Tr. 44140-42; 44446), and to produce an equilibrium between costs and price (Tr. 44142).

(jjj) A normal rate of return is one that makes investment equally attractive with investments in other industries (Tr. 43331); the ratio of profits to investment is an indication of the presence or absence of competition (Tr.

43021-22; 43329-30; 43387-88; 44154-56; 44749; 45255-59; 45558-60); the fact that different producers have different rates of return on their respective investments indicates "imperfect competition" but does not indicate collusion (Tr. 44316-17).

(kkk) Cost of production influences price but price is not determined by cost of production (Tr. 43837. To the same effect, Dr. Viner—Tr. 15839); prices lower than can reasonably be maintained (as during a price war) are not beneficial to the consumer (Dr. Hibbard—Tr. 20591-92); meeting a competitor's price tends to keep prices down near cost of production and to keep earnings from exceeding a normal rate (Tr. 45601); producers with costs higher than those whose output is necessary to supply the demand will, under free competition, tend to be driven out of business (Tr. 43633; 44441-44; 44959-60).

(lll) The absence of a constantly fluctuating price in this industry is not an indication of the absence of price competition (Tr. 45152. To the same effect, Dr. Hibbard—Tr. 20580); selling at delivered prices by using multiple basing points does not tend to prevent competition from producing the results an economist expects from competition (Tr. 44142-43; 44568-69).

(mmm) The multiple basing-point method of marketing is not an artificial method (Tr. 43229; 44135; 44794; 45395-96; 45595-96; 45909); it can exist and function as a result of competitive forces operating independently (Tr. 43231; 43581; 44108; 44795-96; 45597); it does not require cooperation tantamount to an agreement (Tr. 43232-36; 44110-13; 44569-72; 44798-810; 45404-05; 45597; 45910-11); it does not require a mutuality of behavior (Tr. 43232-36; 44110-11; 44798-810; 45406-07); it does not have to be policed (Tr. 43229; 44135); it can exist and be maintained as an expression of the Law of Supply and Demand (Tr. 43231-32; 43999-4002; 44108-10; 44796-97; 45597); it is not a method of avoiding price competition (Tr. 43209-10; 44761-65; 45504-05); so-called "dual bases" with a state line for their dividing point do not indicate collusion or the absence of price competition (Tr. 43210-11; 44341-42; 44767-69;

45322-24; 45582-83; 45902-06); a basing-point mill cannot prevent the "invasion of its marketing area by a competitor (Tr. 43232-36; 44112-13; 44798-810) and the mill thus "invaded" is not acting like a conspirator rather than a competitor (Tr. 43232-36; 44110-11; 44798-810; 45597-98; 45911).

(nnn) Meeting a competitor's price is a normal competitive act (Tr. 43209-10; 43228-29; 44181-82; 44337-38; 44761-65; 44650; 45394; 45504-05; 45902; 45906-07); complete identity of competitors' prices at any one time and place can arise spontaneously from individual activity (Tr. 44338-40; 44770-76); the identity of price expected under full competition in such an industry is not an identity of price at the mill (Tr. 44340-41); rigidity of certain base prices for a few months would not be extraordinary in a competitive industry (Tr. 43224; 44209; 44790); rigidity of certain base prices from January 1933 to 1938 does not indicate the absence of normal or usual competitive forces (Tr. 43221-23; 44207-09; 44789-90; 45592-93; 45601-03) or the presence of collusion (Tr. 43221-23; 44209; 44770-76; 45601-03); the increase in base prices in the Middle West in 1932 was consistent with the existence of a freely competitive market (Tr. 43216-17; 43989-91; 45605; 45907-08) and with the Law of Supply and Demand, even if consumption and demand were then declining (Tr. 43216-17; 44335-36), did not indicate a power of control over price (Tr. 43224-26; 44335-36; 44790-91; 45908) or justify an inference of collusion (Tr. 44790-91) nor was it an extraordinary phenomenon (Tr. 45604). A constant differential between two base prices for a long period is not inconsistent with active genuine price competition (Tr. 43211-12; 44206-07; 44769; 45237-38; 45324-25; 45583).

(ooo) Freight-absorbing sales are analogous to dumping in international trade (Tr. 43199; 44344-45; 44756; 45543-44); the latter tends to lower price and increase competition where dumped (Tr. 43199-200; 44345; 45543-44; 45701); it makes it possible to sell at a lower price in the domestic market (Tr. 43201; 44345; 45702); it does not indicate a monopoly control at the place of production (Tr. 43202-03; 44346-47; 45758; 45728; 45280; 45544-45); the

goods dumped are not regularly sold at a price less than the going price in that market (Tr. 43203-04; 44347; 44759; 45298-99; 45545-46). Freight-absorbing sales also increase competition and tend to reduce price in the markets affected (Tr. 43201-02; 44345; 44757-58; 45544); they occur only under conditions of "imperfect competition" (Tr. 43202-03) and do not indicate the absence of free competition (Tr. 43936; 45280-81) nor does such reciprocal domestic dumping indicate collusion (Tr. 44349; 44523-25); to abolish them would limit and reduce competition (Tr. 43203-04; 44347-48; 44759-60; 45548-49) and could only be accomplished by collusion or governmental action (Tr. 43204; 44760).

(ppp) The word "price" when referring to "price in a market" is not a freightless price, as the term "price" is used by economists (Tr. 43218-21; 43974-75; 44430-31; 44674-75; 44780-83; 45111-21) and the consensus of economic opinion is in disagreement with Dr. Fetter on this point (Tr. 44780-83; 44674-75; 45118-21; 45348-51); "price" denotes what the buyer pays for the goods delivered at the agreed destination (Tr. 43221; 43975; 43978; 45490); "delivered price" is not a compound term that combines the price of cement and the price of freight (Tr. 43218-21; 43227-28; 43974-75; 43987-88; 44330-31; 45344-45; 45348-51; 45487-90).

(qqq) The conditions of a "true market" as stated by Dr. Fetter (Tr. 17906-13) are generally similar to the conditions of "perfect competition" (Tr. 43150-54; 44500-02); in an industry selling at delivered prices with a multiple basing-point method, each destination constitutes a "market" (Tr. 43228; 44174-76; 44792). It is not true that in such an industry selling in this manner there is no "market" in the economic sense (Tr. 43228; 44174-76; 44792; 45373-76; 45908) and the overwhelming consensus of opinion among economists is in disagreement with Dr. Fetter's statement to this effect (Tr. 44792; 45378-81).

"Competition"

Paragraphs 228-229

1. Exception is taken generally, to the recapitulation of conclusions stated in Paragraph 228 on all of the grounds heretofore stated in exceptions to Paragraphs 1 to 227, and on the further ground that conclusions do not properly constitute any part of a report upon the evidence. Exception is specifically taken to the quaint but wholly imaginary and unsupported reference to the "little pea" in connection with the nature and extent of the competition which attends government invitations (See particularly exceptions to Paragraphs 88-103; 130-138, *supra*).

2. Exception is taken to the statement of respondents' contentions in Paragraph 229 on the ground that such statement is inaccurate, inadequate and misleading.

Respectfully submitted,

DONOVAN, LEISURE, NEWTON & LUMBARD,
By GEORGE S. LEISURE,
Attorneys for the above named
Respondents.

Of Counsel:

BULKLEY, LEDYARD, DICKINSON & WRIGHT,
Union Guardian Building,
Detroit, Michigan,
Counsel for Aetna Portland Cement Company.

PORTER & TAYLOR,
LOUIS H. PORTER,
60 East 42nd Street,
New York, New York,
Counsel for Alpha Portland Cement Company.

LEWIS & GRANT,
JAMES B. GRANT,
First National Bank Building,
Denver, Colorado,
Counsel for Arkansas Portland Cement Company, Colorado Portland Cement Company, Nebraska Cement Company, Oklahoma Portland Cement Company, Three Forks Portland Cement Company and Union Portland Cement Company.

HARRINGTON, HUXLEY & SMITH,
1200 Mahoning Bank Building,
Youngstown, Ohio,
Counsel for Bessemer Limestone & Cement Company.

CHICKERING & GREGORY,
WALTER C. FOX,
111 Sutter Street
San Francisco, California,
Counsel for Calaveras Cement Company.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
DONALD F. MCPHERSON,
11 South LaSalle Street,
Chicago, Illinois,
Counsel for Consolidated Cement Corporation, Florida Portland Cement Company, Signal Mountain Portland Cement Company and Trinity Portland Cement Company.

WILLIAM P. SIMPSON,
515 Renkert Building,
Canton, Ohio,
Counsel for Diamond Portland Cement Company.

STRANGE, MYERS, HINDS & WIGHT,
ROGER HINDS,
165 Broadway,
New York, New York,
Counsel for Edison Cement Corporation.

BARNES, BIDDLE & MYERS,
1601 Morris Building,
Philadelphia, Pennsylvania,
Counsel for Giant Portland Cement Company.

J. EDWARD SINGLETON,
16 Ridge Street,
Glens Falls, New York,
Counsel for Glens Falls Portland Cement Company.

MILBANK, TWEED & HOPE,
GEORGE W. JAQUES,
15 Broad Street,
New York, New York,
Counsel for Great Lakes Portland Cement Corporation and Lehigh Portland Cement Company.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
63 Wall Street,
New York, New York,
Counsel for Green Bag Cement Company of Pennsylvania.

HARRY SCHERR,
First Huntington National Bank Building,
Huntington, West Virginia,
Counsel for Green Bag Cement Company of West Virginia.

DAVIS, HEIL & DAVIS,
Zeigler Building,
Spokane, Washington,
Counsel for Idaho Portland Cement Company.

CHADBOURNE, WALLACE, PARKE & WHITESIDE,
HORACE G. HITCHCOCK,
25 Broadway,
New York, New York,
Counsel for Lone Star Cement Corporation.

THOMPSON, HINE & FLORY,
CHARLES W. SELLERS,
Guardian Building,
Cleveland, Ohio,
Counsel for Medusa Portland Cement Company.

PAUL BROWN,
121½ South Main Street,
Wichita, Kansas,
Counsel for Monarch Cement Company.

W. D. BURNETT,
Bartlett Building,
Los Angeles, California,
Counsel for Monolith Portland Cement Company
and Monolith Portland Midwest Company.

STOKELY, SCRIVNER, DOMINICK & SMITH,
First National Bank Building,
Birmingham, Alabama,
Counsel for National Cement Company.

BEEKMAN, BOGUE, STEPHENS & BLACK,
C. ALFRED CAPEN,
15 Broad Street,
New York, New York,
Counsel for North American Cement Corporation.

EARL SMITH,
508 First National Bank Bldg.,
Mason City, Iowa,
Counsel for Northwestern States Portland Cement
Company.

PILLSBURY, MADISON & SUTRO,
MARSHALL P. MADISON,
Standard Oil Building,
San Francisco, California,
Counsel for Pacific Portland Cement Company.

CLARK, KLEIN, BRUCKER & WAPLES,
2850 Penobscot Building,
Detroit, Michigan,
Counsel for Peerless Cement Corporation.

SHEARMAN & STERLING,
ROBERT N. WEST,
55 Wall Street,
New York, New York,
Counsel for Pennsylvania-Dixie Cement Corporation.

O'MELVENY & MYERS,
PIERCE WORKS,
233 South Spring Street,
Los Angeles, California,
Counsel for Riverside Cement Company.

MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
HERBERT W. CLARK,
Crocker Building,
San Francisco, California,
Counsel for Santa Cruz Portland Cement Company.

CRENSHAW, HANSELL & GUNBY,
Trust Company of Georgia Bldg.,
Atlanta, Georgia,
Counsel for Southern States Portland Cement Company.

RICHARD F. BURGES,
El Paso, Texas,
Counsel for Southwestern Portland Cement Company.

REED, SMITH, SHAW & MCCLAY,
Union Trust Building,
Pittsburgh, Pennsylvania,
Counsel for Standard Portland Cement Company.

E. G. Miller,
44-47 First National Bank Bldg.,
Portsmouth, Ohio,
Counsel for Superior Cement Corporation.

Cates, Smith & Long,
Charles H. Smith,
Hamilton National Bank Bldg.,
Knoxville, Tennessee,
Counsel for Volunteer Portland Cement Company.

E. H. Molthan,
2500 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pennsylvania,
Counsel for Whitehall Cement Manufacturing Company.

Cowell & Frankhauser,
Branch County Savings Bank Bldg.,
Coldwater, Michigan,
Counsel for Wolverine Portland Cement Company.

Earl, Hall & Gerdes,
215 Market Street,
San Francisco, California,
Counsel for Yosemite Portland Cement Corporation.

Index to Paragraphs of Exceptions

PAR. NO.		PAGE
1		1
2		7
3		7
4		7
5		11
7		12
8	(Alpha)	20
9	(Arkansas)	42
10	(Ash Grove)	48
11	(Beaver)	55
12	(Bessemer)	57
13	(Calaveras)	63
15	(Castalia)	68
16	(Colorado)	70
17	(Consolidated)	72
18	(Coplay)	75
19	(Cumberland)	79
20	(Dewey)	85
21	(Diamond)	110
22	(Edison)	112
23	(Federal)	121
24	(Florida)	126
25	(Georgia)	129
26	(Grant)	132
27	(Glens Falls)	136
29	(Green Bag of Pennsylvania)	139
30	(Green Bag of West Virginia	142
31	(Hawkeye)	148
32	(Hercules)	151
33	(Hermitage)	163
35	(Idaho)	169
36	(Lone Star)	171
37	(Keystone)	190
38	(Kosmos)	196
39	(Lawrence)	201
40	(Lehigh)	208
42	(Medusa)	234
43	(Missouri)	245
44	(Monarch)	254
45	(Monolith)	263
46	(Monolith Midwest)	265
47	(National)	267
48	(Nazareth)	275
49	(Nebraska)	287
50	(North American)	294
52	(Northwestern States)	301
53	(Oklahoma)	314
54	(Oregon)	320
55	(Pacific)	324
56	(Peerless)	327
57	(Penn-Dixie)	332
58	(Petoskey)	347
59	(Pittsburgh Plate Glass)	354
60	(Utah)	359
62	(Santa Cruz)	363
63	(Signal Mountain)	369
64	(Southern States)	373
65	(Southwestern)	380
67	(Standard)	395
68	(Superior Cement Corporation)	399
70	(Three Forks)	403
71	(Trinity)	406
72	(Union)	409
74	(Valley Forge)	413
75	(Volunteer)	414
76	(Vulcanite)	422
77	(Wabash)	427
75	(West Penn)	429
79	(Whitehall)	438
80	(Wolverine)	447

PAR. NO.	PAGE
81 (Yosemite)	451
82	454
83	455
84	455
85	458
86	458
87	459
88-92 (Section I)	467
88-92 (Section II)	479
93(a)-(m)	496
94-103	503
104-113	509
114	516
115	519
116	522
117	526
118	530
119	530
120-122	532
123-129	538
130-138	546
139-146	566
147	583
148-150	586
151-158	588
159-160	603
161-162	606
163	608
164	610
165	612
166	613
167	614
168	616
169-170	617
171	619
172	621
173	623
174	626
175	627
176	629
177	630
178	630
179	632
180	632
181	633
182	635
183	636
184-187	638
188	644
189-190	646
191	652
192	653
193	654
194	655
195	658
196	659
197	659
198	663
199	663
200	665
201	666
202	667
203	668
204	669
205	671
206	673
207-211	675
212-219	688
220-223	694
224	697
225	701
226	702
227	709
228-229	736